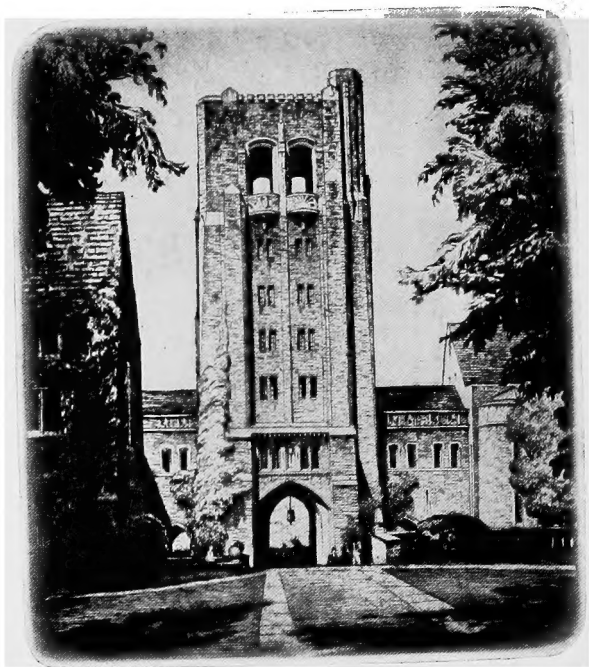


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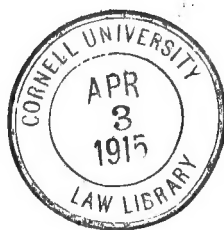
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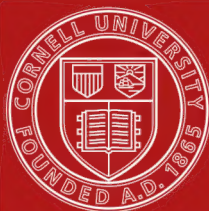
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A
PRACTICAL TREATISE
ON
CRIMINAL LAW,
AND
PROCEDURE IN CRIMINAL CASES,
BEFORE
JUSTICES OF THE PEACE
AND IN
COURTS OF RECORD
IN THE
STATE OF ILLINOIS,
WITH
FULL DIRECTIONS AND FORMS
FOR
EVERY CRIMINAL CASE.

BY
IRA M. MOORE,
• • •
AUTHOR OF "MOORE'S CIVIL JUSTICE."
"

CHICAGO:
CALLAGHAN AND COMPANY.
1876.

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PREFACE.

The object of this book is, first, to furnish magistrates, sheriffs and constables a full and complete guide in criminal cases, and, secondly, to furnish to the members of the profession and to the courts a concise statement of the law now in force relating to crimes and to the procedure for their punishment.

The new constitution and the statutes recently revised render a large portion of many of the books already written on criminal law inoperative and useless. This useless matter is so mixed up with the useful in these books as to make it burdensome and difficult to select that which is in force from that which has been repealed; besides, it makes the books too large or too numerous for convenience. In this book I have endeavored to select and separate all the rules of the common law now in force from those which have become inoperative, and to engraft the constitution and statutes upon them so as to form of the whole one uniform and consistent system of criminal jurisprudence, at the same time omitting all of the superfluous and inoperative portions of the criminal law. No pains have been spared to make the work plain, clear and intelligible, and at the same time to compress it within such a compass as to have it contain in one volume all that is really useful and necessary, usually found in several volumes. The law is stated in the text as it is believed to be in the state of Illinois with a reference to the English and American decisions on which it is based, and where the authorities are conflicting, or the rule is different in England or in any of the other states, the word "*contra*" is added and the authorities so holding cited, so that the rule elsewhere may be readily ascertained by examining these authorities.

This work is intended to comprise the whole of the criminal law in indictable cases from the commission of the offense to the arrest, examination, trial, conviction and sentence of the offender and to the reversal or affirmance of the judgment on error, with the necessary forms for each case. To most of these forms are added foot-notes on their component parts, showing just what words may be omitted and what are essential.

In preparing the whole work I have used my best endeavor to make it a good one—with what success, is for others to judge. If it shall be really useful I shall be satisfied.

IRA M. MOORE.

QUINCY, ILL., January, 1876.

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A PRACTICAL TREATISE
ON
CRIMINAL LAW.

CHAPTER I.

CRIMES IN GENERAL.

- § 1. Offenses Classified—Treason—Felony Defined.
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4. When an Infant may Commit a Crime.
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§ 1. Offenses Classified — Treason — Felony Defined. — “A criminal offense consists in the violation of a public law, in the commission of which there shall be a union or joint operation of act and intention, or criminal negligence.”¹ Crimes at common law are divided into three classes: treasons, felonies

¹ R. S., 394, § 280.

and misdemeanors.¹ At common law a felony comprised every species of crime which occasioned the forfeiture of either lands or goods or both.² The chief, if not the only, felonies at common law were murder, manslaughter,³ arson,⁴ burglary,⁵ robbery,⁶ rape,⁷ sodomy,⁸ mayhem,⁹ and larceny.¹⁰ Treason at common law was a felony and something more, making it a higher crime.¹¹ In this state a felony is defined by statute to be "an offense punishable with death or imprisonment in the penitentiary."¹²

§ 2. **Misdemeanors Defined.** — Misdemeanors comprise all offenses lower than felonies which may be the subject of an indictment. They are of two classes, such as are *mala in se* or punishable at common law, and such as are *mala prohibita* or penal by statute. Whatever, under the first class, mischievously affects the person or property of another, or openly outrages decency, or disturbs public order, or is injurious to the public, or is a breach of official duty, when done corruptly is the subject of indictment.¹³ "When the performance of an act is prohibited by any statute, and no penalty for the violation of such statute is imposed, the doing of such act is a misdemeanor, and may be punished by fine not exceeding one hundred dollars, or imprisonment in the county jail not exceeding six months, or both, in the discretion of the court."¹⁴

§ 3. **Infamous Crimes.** — "Every person convicted of the

¹ 1 Whart. Cr. L., § 1.

² Adams v. Barrett, 5 Ga., 404; 4 Black. Com., 94, 95.

³ 1 Whart. Cr. L., § 2.

⁴ 3 Chitty Cr. L., 1120; Sampson v. Com., 5 Watts & S., 385.

⁵ Rosc. Cr. Ev., 338.

⁶ 2 Bish. Cr. L., § 120.

⁷ 1 Hale P. C., 627; 3 Inst., 60; 1 East P. C., 434; Mears v. Com., 2 Grant Pa., 385.

⁸ 4 Black. Com., 215; 1 Hawk P. C., 4; 1 Whart. Cr. L., § 2.

⁹ 1 Whart. Cr. L., § 2, 11, 71 to 1175; *contra*, Com. v. Newell, 7 Mass., 248; Adams v. Barrett, 5 Ga., 403; 2 Bish. Cr. L., § 108.

¹⁰ People v. Adler, 3 Park. Cr. R., 254; Ward v. People, 3 Hill, 398.

¹¹ 1 Bish. Cr. L., § 612.

¹² R. S., 394, § 277.

¹³ Id., § 278; Walsh v. People, 65 Ills., 58.

¹⁴ R. S., 394, § 278.

crime of murder, rape, kidnapping, willful and corrupt perjury or subornation of perjury, arson, burglary, robbery, sodomy, or other crime against nature, incest, larceny, forgery, counterfeiting, or bigamy, shall be deemed infamous, and shall forever thereafter be rendered incapable of holding any office of honor, trust or profit, of voting at any election, or serving as a juror, unless he is again restored to such rights by the terms of a pardon for the offense, or otherwise according to law."¹

§ 4. When an Infant may Commit a Crime. — "An infant under the age of ten years cannot be found guilty of any crime or misdemeanor."² Between the ages of ten and fourteen he is presumed to be incapable of committing any crime whatever;³ but this presumption may be rebutted by evidence of circumstances showing clearly that the infant was at the time of committing the offense capable of knowing the distinction between good and evil.⁴ Malice supplies age, but the evidence of that malice which is to supply age ought to be strong and clear beyond all reasonable doubt.⁵ At and above the age of fourteen, an infant is presumed, in point of understanding, capable of committing any crime until the contrary be proved.⁶ To these rules there are some exceptions, for an infant is not liable criminally for mere non-feasance, such as (if under the age of eighteen) not apprehending persons committing felonies, or the like.⁷ It has been held that an infant under the age of fourteen years is physically incapable of committing the crime of rape.⁸ Under our statute he cannot commit such

¹ R. S., 394, § 279.

² Id., § 283.

³ *State v. Goin*, 9 Humph., 175; *Rex v. Owen*, 4 Car. & P., 236; 3 Greenl. Ev., § 4; 1 Arch. C. P. & Pl., 8; 1 Bish. Cr. L., 368.

⁴ Id.; R. S., 394, § 282; *State v. Gould*, 5 Halst., 163; *State v. Aaron*, 1 Southard, 231; *People v. Garrett*, 5 City Hall Rec., 137.

⁵ 4 Black. Com., 24; *Rex v. Owen*, 4 Car. & P., 236; *State v. Bostick*, 4 Harring. Del., 563; 3 Chitty Cr. L., 724.

⁶ 3 Greenl. Ev., § 4; 1 Hale, 25; *State v. Handy*, 4 Harring. Del., 566.

⁷ 1 Arch. C. P. & Pl., 8; R. S., 400, § 341.

⁸ *Rex v. Eldersham*, 3. Car. & P., 396; *Reg v. Jordon*, 9 Car. & P., 118; *People v. Randolph*, 2 Parker, 213; *Rex v. Groombridge*, 7 Car. & P., 582; *Reg. v. Phillips*, 8 Id., 736; *State v. Handy*, 4 Harring. Del., 566; *State v. Sam*, Winston, 300.

crime on a female child under the age of ten years.¹ But in other states it has been held that the presumption of the incapacity of an infant to commit the crime of rape may be overcome by evidence showing that he has arrived at the age of puberty.²

§ 5. *Insanity — Idiocy.* — The want of a sufficient mental capacity to form a criminal intent, arising from insanity³ or idiocy,⁴ renders a person incapable of committing a crime. Sanity is an ingredient in a crime as essential as the overt act,⁵ though it is not necessary for the prosecution to allege or prove it in the first instance, for the reason that sanity is always presumed;⁶ but when evidence of insanity has been introduced by the accused and a reasonable doubt of his sanity is thereby created, the accused cannot be convicted of the crime charged.⁷ It is not necessary that such evidence should be established by a preponderance of evidence.⁸ The insanity, to be a defense, must be such as to deprive the party charged with crime of the use of reason in regard to the act done. He may be sufficiently sane to distinguish between right and wrong as to other matters, or he may be deranged on other subjects and be responsible for his acts; yet if he is capable of distinguishing between right and wrong in the particular act done by him, he is justly liable to be punished as a criminal.⁹ Our court has said "that a safe and reasonable test in all cases would be that whenever it should appear from the evidence that at the time of doing the act charged the

¹ R. S., 388, § 237.

² *Williams v. State*, 14 Ohio, 222; *Omera v. State*, 17 Ohio, 515; *Moore v. State*, 17 Ohio, 521; *Id.*, 174; *Com. v. Green*, 2 Pick., 380.

³ R. S., 394, § 284.

⁴ *Id.*, 395, § 286.

⁵ *Chase v. People*, 40 Ills., 358; *Hopps v. People*, 31 Ills., 385.

⁶ *Fisher v. People*, 23 Ills., 283; *Lilley v. Waggoner*, 27 Ills., 395.

⁷ *Chase v. People*, 40 Ills., 358; *Hopps v. People*, 31 Ills., 385; *People v. McCann*, 16 N. Y., 58; *contra*, *Com. v. Rogers*, 7 Met., 500; *Com. v. Eddy*, 9 Law R. (N. S.), 611; *Tweedy v. State*, 5 Iowa, 433.

⁸ *Hopps v. People*, 31 Ills., 385; *Chase v. People*, 40 Ills., 358; *contra*, *Fisher v. People*, 23 Ills., 283; *State v. Felter*, 32 Iowa, 50.

⁹ *Freeman v. People*, 4 Denio, 29; *Fouts v. State*, 4 Greene Iowa, 500.

prisoner was not of sound mind, but affected with insanity, and such affection was the efficient cause of the act, and that he would not have done the act but for that affection, he ought to be acquitted. But this unsoundness of mind or affection of insanity must be of such a degree as to create an incontrollable impulse to do the act charged, by overriding the judgment and obliterating the sense of right and wrong as to the particular act done, and depriving the accused of the power of choosing between them. If it is shown that the act was in consequence of an insane delusion, and caused by it and nothing else, justice and humanity alike demand an acquittal.”¹

§ 6. **Counseling Infant, Idiot or Lunatic, to Commit Crime.**—“Any person counseling and advising or encouraging an infant under the age of ten years, lunatic or idiot, to commit any offense, shall be prosecuted for such offense when committed as principal, and if found guilty shall suffer the same punishment that would have been inflicted on such person counseling, advising or encouraging as aforesaid had he committed the offense directly, without the intervention of such infant, lunatic or idiot.”²

§ 7. **Drunkenness** is not an excuse for any crime or misdemeanor,³ yet there are authorities holding that where a particular intent must be joined with the act in order to complete the offense, if, without the intent, one by drink makes himself incapable of entertaining the intent, and so does the act, but neither then nor afterwards yields it the sanction of his will, he does not commit the particular crime or misdemeanor, one ingredient of which is wanting, whatever other criminal responsibility he may incur.⁴ Our Supreme Court,

¹ *Hopps v. People*, 31 Ills., 391-2.

² R. S., 395, § 287.

³ R. S., 395, § 291; *State v. Cross*, 27 Mo., 332; *Kenny v. People*, 31 N. Y., 830; 24 Wis., 452.

⁴ *State v. Schingen*, 20 Wis., 79; *People v. Eastwood*, 14 N. Y., 565; *Com. v. Jones*, 1 Leigh, 612; *Haile v. State*, 11 Humph., 154; *Swan v. State*, 4 Humph., 136; *Pigman v. State*, 14 Ohio, 555; *U. S. v. Rondenbush*, 1 Bald., 514; *Mooney v. State*, 33 Ala., 419; *State v. Garvey*, 11 Min., 154; *McIntyre v. People*, 38 Ills., 520.

however, have adopted the rule that when without intoxication the law would impute to the act a criminal intent, as in the case of a wanton killing without provocation, drunkenness is not available to disprove such intent.¹ Evidence of intoxication is always admissible in a criminal prosecution as tending to show whether and how far the act was done in the heat of passion and in general explanation of the defendant's declarations and conduct,² but the fact of voluntary intoxication will supply the place of malice aforethought, and will not reduce an act which in a sober man would be murder to the grade of manslaughter.³ The loss of one's reason, if not caused by the immediate use of intoxicating drinks, but by a fixed disease, though such disease is brought on by his own intemperance or other vices, renders him incapable of the commission of crime.⁴ Such insanity produced by the *delirium tremens* or other fixed disease affects the responsibility in the same manner as insanity produced by any other cause.⁵ If a party is made drunk by fraud, contrivance, force, strata-gem⁶ or the unskillfulness of his physician,⁷ he is not responsible.

§ 8. **Married Woman Acting under Coercion of Husband.** — At common law if the husband was present at the time his wife committed any criminal offense (except possibly treason,

¹ *Rafferty v. People*, 5 Chicago L. N., 100, 66 Ills., 118; *Ohiran v. State*, 14 Ind., 420; *People v. Rogers*, 18 N. Y., 9.

² *Rafferty v. People*, 5 Chicago L. N., 100; *People v. Eastwood*, 14 N. Y., 562; *People v. Rogers*, 18 N. Y., 9; 1 Bish. Cr. L., §§ 406-416.

³ *McIntyre v. People*, 38 Ills., 514; *State v. Harlow*, 21 Mo., 446; *Schaller v. State*, 14 Mo., 502; *People v. Robinson*, 2 Park. C. R., 235; *People v. Hammill*, 2 Park. Cr. R., 223; *People v. Garbutt*, 17 Mich., 9; *Com. v. Hawk*, 3 Gray, 463; *Nichols v. State*, 8 Ohio S., 435.

⁴ *U. S. v. Drew*, 5 Mason, 28; *U. S. v. Clark*, 2 Cranch C. C. R., 158; *Bailey v. State*, 22 Ind., 422; *Lanegran v. People*, 50 Barb., 266.

⁵ *Maconnebrey v. State*, 5 Ohio S., 77; *State v. Sewell*, 3 Jones L. R., 245; *Carter v. State*, 12 Texas, 500.

⁶ R. S., 395, § 291.

⁷ *Pearson's case*, 2 Lewin, 144; 1 Hale P. C., 32; *People v. Robertson*, 2 Park. C. R., 235; *Choice v. State*, 31 Ga., 424; 1 Bish. Cr. L., 405.

murder, robbery,¹ and keeping brothels,² &c.), the law presumed that the wife acted under the coercion of the husband, and excused her and punished the husband only,³ although such presumption could be rebutted by evidence⁴ and the wife punished.⁵ But this rule seems to be somewhat modified by our statute, which provides that "a married woman acting under threats, command or coercion of her husband, shall not be found guilty of any crime or misdemeanor not punishable with death: *Provided*, it appears, from all the facts and circumstances of the case, that violent threats, command or coercion were used; and in such case the husband shall be prosecuted as principal, and receive the punishment which would otherwise have been inflicted on the wife if she had been found guilty."⁶

§ 9. **Committing Crime under Compulsion.** — "A person committing a crime or misdemeanor not punishable with death, under threats or menaces which sufficiently show that his life or member was in danger, or that he had reasonable cause to believe, and did believe, that his life or member was in danger, shall not be found guilty; and such threats and menaces being proved and established, the person compelling by such threats or menaces the commission of the offense, shall be considered as principal, and suffer the same punishment as if he had perpetrated the offense."⁷

§ 10. **The Criminal Intent.** — In order to constitute a crime, there must be "a union or joint operation of act and intention or a criminal negligence."⁸ Acts committed by misfortune

¹ *Com. v. Neal*, 10 Mass., 152; *Rex v. Knight*, 1 Car. & P., 116.

² *State v. Bentz*, 11 Mo., 27; *Rex v. Dixon*, 10 Mod., 335; *Rex v. Williams*, 10 Mod., 63.

³ *Davis v. State*, 15 Ohio, 72; *Rex v. Price*, 8 Car. & P., 19; *State v. Nelson*, 29 Me., 329.

⁴ *Rex v. Cruse*, 2 Moody R., 53; *Uhl v. Com.*, 6 Grat., 706; 1 Bish. Cr. L., § 362.

⁵ 1 Hale P. C., 516; 1 Arch. C. P. & Pl., 47; Barb. Cr. L., 276; 1 Whart. Cr. L., §§ 73, 78, 81.

⁶ R. S., 395, § 288; *Miller v. State*, 25 Wis., 384.

⁷ *Id.*, § 289.

⁸ R. S., 394, § 280.

or accident cannot "be deemed criminal where it satisfactorily appears that there was no evil design or intention or culpable negligence."¹ The "intention is manifested by circumstances connected with the perpetration of the offense, and the sound mind and discretion of the person accused."² Every person is presumed to be innocent until he is proved to be guilty;³ yet it is a rule equally sound that every sane person is presumed to contemplate the ordinary and natural consequences of his own acts.⁴ Therefore when one man is found to have killed another, the presumption is that the slayer intended to kill the deceased⁵ unless the circumstances connected with the homicide show that such was not the intention.⁶ The use of a deadly weapon in making an assault will be presumed to be with a felonious and malicious intent;⁷ yet that presumption is not conclusive and the intent may be shown to be innocent.⁸

§ 11. *Effect of a Mistake or Ignorance of the Law.* — If a criminal act is done through a mistake or ignorance of the law, it is nevertheless punishable as a crime,⁹ for every man is bound to know the law of the country in which he dwells¹⁰ or in which, if residing abroad, he transacts business,¹¹ even if the law consists of a statute so recently passed that it is impossible for him to have any knowledge of its existence.¹² To this

¹ R. S., 394, § 290.

² Id., § 281.

³ *West v. State*, 1 Wis., 209; *Pilkington v. State*, 19 Texas, 14; *Horne v. State*, 1 Kansas, 42; *People v. Dixon*, 4 Park. C. R., 651; *Tweedy v. State*, 5 Iowa, 433.

⁴ *York v. Com.*, 9 Met., 103; *Com. v. Drew*, 4 Mass., 391; *People v. Herick*, 13 Wen., 87.

⁵ *State v. Turner*, Wright, 20; 1 Whart. Cr. L., 712.

⁶ 3 Greenl., § 14.

⁷ 1 Whart. Cr. L., § 712.

⁸ *Armstrong v. People*, 38 Ills., 513.

⁹ 3 Greenl. Ev., § 20; *Winehart v. State*, 6 Porter, 30.

¹⁰ *Lyon v. Richmond*, 2 John. Ch., 51, 60; *Bilbie v. Lumley*, 2 East, 469; 1 Bish. Cr. L., §§ 294, 300; 1 Arch. C. P. & Pl., 55; 1 Whart. Cr. L., § 83; *Stover v. Mitchell*, 45 Ills., 213.

¹¹ *Cambisco v. Maffett*, 2 Wash. C. C., 98; *Rex v. Esop*, 7 Car. & P., 456.

¹² *The Ann*, 1 Gallis, 62; *Branch Bank of Mobile v. Murphy*, 8 Ala., 119; *Heard v. Heard*, 8 Ga., 380.

rule there are some real or apparent exceptions. Thus where the accused, knowing all the facts, through a misapprehension of the law honestly believes property to be his and takes it, he is not guilty of larceny, for one element of such crime, that is, a felonious intent, is wanting.¹ So under the former United States bankrupt act it was held that if a bankrupt submits the facts concerning his property fairly and honestly to his counsel, and thereupon receives advice in pursuance of which he withholds from his schedule certain items which truly, as a matter of law, ought to be put upon it, he still in swearing to the schedule does not commit the crime of perjury.² Likewise in proceedings against magistrates and other *quasi* judicial and sometimes ministerial officers, for acting corruptly in their office, their misapprehension of the law may be set up in answer to the charge of corruption;³ unless, perhaps, the mistake were induced by gross carelessness or ignorance partaking of the criminal quality.⁴ A foreigner cannot be excused on the ground that he does not know the law;⁵ but ignorance of the laws of a foreign country is ignorance of fact, and persons are not required to know facts.⁶

§ 12. *Effect of a Mistake or Ignorance of the Facts.* — Ignorance or mistake of facts is in all cases of a supposed offense an excuse;⁷ as if a man, intending to kill a thief in his own house, by mistake kills one of his own family, he is guilty of no

¹ *Rex v. Hall*, 3 Car. & P., 409; *Reg. v. Reed*, Car. & M., 306; *Com. v. Doane*, 1 Cush., 5; *State v. Homes*, 17 Mo., 379. A mere pretense of a claim, set up by one who does not himself believe it to be valid, does not prevent the act of taking from being larceny. *State v. Bond*, 8 Iowa, 540.

² *U. S. v. Conner*, 3 McLean, 573; *Reg. v. Langford*, Car. & M., 602, 605; *Goforth v. State*, 8 Humph., 37; *Dye v. Com.*, 7 Grat., 662.

³ *Rex v. Jackson*, 1 T. R., 653; *Com. v. Shedd*, 1 Mass., 227. *People v. Calhoun*, 3 Wen., 420.

⁴ *Rex v. Stukeley*, 12 Mod., 493; 1 Bish. Cr. L., §§ 298, 299.

⁵ *Rex v. Esop*, 7 Car. & P., 456; *Cambisco v. Muffett*, 2 Wash. C. C., 98.

⁶ *Haven v. Foster*, 9 Pick., 112; 1 Story Eq. Jur., § 140.

⁷ *Broom Leg. Max.*, 190; 4 *Black Com.*, 27; 3 *Greenl. Ev.*, § 21; *Com. v. Drew*, 19 Pick., 179, 184; *Meyers v. State*, 1 Conn., 502; *Rex v. Allday*, 8 Car. & P., 136; *U. S. v. Pearce*, 2 McLean, 14.

crime;¹ or where, under an erroneous impression that the act is necessary in self-defense, he kills the supposed aggressor, in which the case is manslaughter or excusable homicide, as the case may be.² So a taking of another's property by a person mistaking it for his own is neither legally nor morally a crime.³ The wrongful intent being the essence of every crime,⁴ the doctrine necessarily follows that whenever a man is misled, without his own fault or carelessness,⁵ concerning facts, and while so misled acts as he would be justified in doing were the facts what he believes them to be, he is legally innocent.⁶ This rule proceeds upon the supposition that the original intention was lawful; for if an unforeseen consequence ensue from an act which was in itself unlawful, and its original nature wrong or mischievous, the actor is criminally responsible for whatever consequences may ensue.⁷ Thus it has been held that where an aggressor assaults a peace officer in ignorance of his official rank he is responsible for the graver offense.⁸ It is no defense to an indictment for a crime that it was the custom of the country to do the act that constituted the crime.⁹

§ 13. A Party must be Punished According to the Law in Force at the Time the Offense was Committed, for a statute does not and can not operate upon offenses committed prior to its passage.¹⁰ And where an original act provides for a punishment

¹ 1 Hale P. C., 507; 1 Whart. Cr. L., § 83; *Rex v. Levett*, Cro. Car., 538; *Regina v. Riley*, 17 Jur., 189.

² 2 Hale, 507; 1 Whart. Cr. L., § 83; *Campbell v. People*, 16 Ills., 17; *Coughlin*, 18 Ills., 266; *Schiner v. People*, 23 Ills., 17; *Maher v. People*, 24 Ills., 241; *Reins v. People*, 34 Ills., 256.

³ *Rex v. Levett*, Cro. Car., 538; 1 Arch. C. P. & Pl., 55, n. 1.

⁴ *State v. Berkshire*, 2 Ind., 207; 3 Greenl Ev., § 13; R. S., 394; § 280.

⁵ *Sturges v. Maitland*, Anthon, 153; *Com. v. Rodes*, 6 B. Monr., 171; R. S., 394, § 280; Id., 395, § 290.

⁶ 1 Bish. Cr. L., § 303; *Yates v. People*, 32 N. Y., 509; *Fairbach v. State*, 24 Ind., 77; *Rincman v. State*, 24 Ind., 80.

⁷ 1 Whart. Cr. L., § 83; 4 Black. Com., 27.

⁸ *U. S. v. Liddle*, 2 Wash. C. C., 205; *U. S. v. Ortega*, 4 Wash. C. C., 531; *U. S. v. Benner*, Baldwin, 234.

⁹ *Bankers v. State*, 4 Ind., 114.

¹⁰ *Musick v. People*, 40 Ills., 268; *Haney v. State*, 5 Wis., 529.

for a violation of its provisions by indictment, such punishment cannot be inflicted for the violation of any of the provisions of an amendment to such act unless the amendment itself authorizes such punishment.¹ The constitution of this state² and of the United States³ prohibits the passing of an *ex-post-facto* law. An *ex-post-facto* law has been said to be: 1. Every law that makes an action done before the passing of the law, and which was innocent when done, criminal; and punishes such action. 2. Every law that aggravates a crime and makes it greater than it was when committed. 3. Every law that changes the punishment and inflicts a greater punishment than the law annexed to the crime when committed. 4. Every law that alters the legal rules of evidence and receives less or different testimony than the law required at the time of the commission of the offense in order to convict the offender.⁴ It has been held the punishment of an offense may be lessened after its commission.⁵

§ 14. **Former Jeopardy.** — A person cannot be twice put in jeopardy for the same offense,⁶ whether a misdemeanor or a felony.⁷ The jeopardy commences when the accused has plead to a valid indictment⁸ on which he could be convicted for the same offense⁹ before a court having jurisdiction of the offense,¹⁰ and a jury is impaneled and sworn to try the cause.¹¹

¹ Zorger v. People, 25 Ills., 193.

² R. S., 60, Con., Art. II., § 14.

³ R. S., 12, 13, Con., Art. I., § 9, 10.

⁴ Calder v. Bull, 3 Dall, 386, 390; Strong v. State, 1 Blackf., 193; 1 Bish. Cr. L., § 251.

⁵ Turner v. State, 40 Ala., 21.

⁶ R. S., 60, Con., Art. II., § 10; Phelps v. People, 55 Ills., 429; Gerard v. People, 3 Scam., 363.

⁷ Rex v. Davis, 12 Mod., 9; Rex v. Bennett, 1 Stra., 101.

⁸ Gerard v. People, 3 Scam., 363; Durham v. People, 4 Scam., 172; Price v. State, 19 Ohio, 423; Williams v. Vaux, 4 T. R., 44; People v. Barrett, 1 John., 66.

⁹ Freeland v. People, 16 Ills., 380.

¹⁰ Com. v. Goddard, 13 Mass., 455; State v. Odell, 4 Blackf., 156; Com. v. Meyers, 1 Va. C., 188; State v. Payne, 4 Mo., 375.

¹¹ Mount v. State, 14 Ohio, 295; U. S. v. Shoemaker, 2 McLean, 114; People v. Barrett, 2 Cal., 304; Brennan v. People, 15 Ills., 512.

The jeopardy is not perfect until the panel is full.¹ If, however, a man has been arrested and discharged by a magistrate;² or a grand jury has refused to find an indictment against him;³ or he is indicted and has plead to the indictment, which is still pending;⁴ or, at the instance of the accused, a new trial is granted;⁵ or the judgment is arrested, even for an insufficient cause;⁶ or the judgment is reversed;⁷ or if the acquittal is obtained by fraud of the defendant;⁸ or the prosecution is controlled by the defendant through his agents or friends, and the punishment is inadequate;⁹ or the prisoner is tried by a jury less in number than the law requires;¹⁰ or the case is put to the jury before an issue has been made up;¹¹ or the prisoner is convicted and punished in another state for an offense against our own laws;¹² or the offense is not the same;¹³ or the proceedings are interrupted before the final verdict is rendered, on account of the sickness of

¹ *State v. Burket*, 2 Mill, 155; *People v. Damon*, 13 Wen., 351; *Stone v. People*, 2 Scam., 326.

² *Marston v. Jenness*, 11 N. H., 156; *Com. v. Meyers*, 1 Va. C., 118; *In re McIntyre*, 5 Gilm., 422; *Bulson v. People*, 31 Ills., 409.

³ *Com. v. Miller*, 2 Ashm., 61; *Reg. v. Newton*, 2 Moody & R., 503; *Com. v. Bailey*, 14 La. An., 364.

⁴ *Com. v. Dunham*, *Thatcher Cr. C.*, 513; *Com. v. Drew*, 3 Cush., 279; *People v. Fisher*, 14 Wen., 9.

⁵ *Com. v. Green*, 17 Mass., 515.

⁶ *Gerard v. People*, 3 Scam., 362; *People v. Casborouze*, 13 John., 351.

⁷ *Sellers v. People*, 1 Gilm., 183; *Lane v. People*, 5 Gilm., 305; *Brennan v. People*, 15 Ills., 517; *Barrett v. People*, 54 Ills., 325; *State v. Krouse*, 33 Iowa, 365.

⁸ *Rex v. Davis*, 12 Mod., 9; *State v. Brown*, 16 Conn., 54; *State v. Davis*, 4 Blackf., 345; *State v. Little*, 1 N. H., 257; *Com. v. Alderman*, 4 Mass., 477.

⁹ *State v. Atkinson*, 9 Humph., 677; *State v. Lowery*, 1 Swan Tenn., 34; *Com. v. Alderman*, 4 Mass., 477; *State v. Green*, 16 Iowa, 239; 1 Arch. C. P. & Pl., 373; 3 Greenl. Ev., § 38; 1 Bish. Cr. L., § 1010.

¹⁰ *Brown v. State*, 8 Blackf., 561.

¹¹ *Ned v. State*, 7 Port., 187; but see R. S., 138, § 6, Sub. 5.

¹² *Phelps v. People*, 55 Ills., 429; *Sanders v. State*, 2 Iowa, 230.

¹³ *McQuoid v. People*, 3 Gilm., 76; *Durham v. People*, 4 Scam., 172; *Guedel v. People*, 43 Ills., 226.

the judge¹ or a jurymen² or the prisoner,³ or on account of a witness refusing to be sworn;⁴ or the jury, after being out a reasonable time, are discharged because they cannot agree;⁵ or one of the panel escapes;⁶ or the jury is discharged by the prisoner's consent,⁷ or the verdict is so incomplete that a judgment cannot be entered upon it;⁸ or if the prisoner absents himself from court at the time when he should be present to receive the verdict,—he has not been legally in jeopardy, and cannot plead what has been done or the conviction in bar to a subsequent proceeding before a magistrate for the purpose of holding him to bail⁹ or to a subsequent trial or indictment.¹⁰ If, after the trial has been commenced, a jurymen is found not to be sufficiently sworn,¹¹ or to be insane,¹² or is under some legal incompetency unknown to either party at the time the case is opened,¹³—as if he is an alien¹⁴ or not a voter,¹⁵—he may be discharged or the error may be otherwise corrected without entitling the prisoner to go free.¹⁶

¹ *Nugent v. State*, 4 Stew. & P., 72.

² *Hector v. State*, 2 Mo., 166; *King v. Edwards*, 4 Taunt., 309; *Stone v. People*, 2 Scam., 337.

³ 1 Bish. Cr. L., § 1032; *People v. Goodwin*, 18 John., 187; *State v. McKee*, 1 Bailey, 651.

⁴ *U. S. v. Coolidge*, 2 Gallis, 364.

⁵ *People v. Goodwin*, 18 John., 187; *State v. Vaughn*, 29 Iowa, 286.

⁶ *State v. Hall*, 4 Halst., 256; *State v. McKee*, 1 Bailey, 651.

⁷ *Elijah v. State*, 1 Humph., 102; *Williams v. Com.*, 2 Grat., 567; *State v. McKee*, 1 Bailey, 651.

⁸ *Sargent v. State*, 11 Ohio, 472; *State v. Underwood*, 2 Ala., 744; *State v. Sutton*, 4 Gill, 494.

⁹ *Bulson v. People*, 31 Ills., 409; *In re McIntyre*, 5 Gilm., 422.

¹⁰ 1 Bish. Cr. L., §§ 978–1047; 3 Greenl. Ev., § 37; 1 Arch. C. P. & Pl., 360; 1 Whart. Cr. L., §§ 573–591.

¹¹ *Rex v. Deleany, Jebb*, 88.

¹² *U. S. v. Haskell*, 4 Wash. C. C., 402.

¹³ *Stewart v. State*, 15 Ohio, 155; *U. S. v. Morris*, 1 Curtis, 23; *People v. Damon*, 13 Wen., 351; *Rex v. Crawford & Dix.*, O. C., 151; *contra*, *Rex v. Perkins*, Holt, 403.

¹⁴ *Stone v. People*, 2 Scam., 336.

¹⁵ R. S., 630, § 1.

¹⁶ 1 Bish. Cr. L., § 1039; 1 Whart. Cr. L., § 588.

§ 15. *Continued.* — If during the trial a *nol pros.* is entered;¹ or the wrong judgment is entered on the verdict;² or the court discharges the jury against the consent of the defendant, before they have had a reasonable time to deliberate;³ or the hearing is stopped on account of the absence of a material witness for the prosecution,⁴ or on account of his not being acquainted with the nature of an oath, so as to require instruction before testifying,⁵ or on account of the witness being taken suddenly too ill to proceed,⁶ or on account of the withdrawing of a jurymen;⁷ or the jury separate by permission of the officer without the consent of the court,⁸—the legal effect is an acquittal, and no second trial can be had.⁹ A verdict is a bar to a subsequent prosecution, though no judgment has been entered upon it.¹⁰ If the jury convict the defendant on an insufficient indictment, and judgment is entered on the verdict, he will be protected while the judgment remains unreversed.¹¹ Even if an appeal or writ of error could be taken by the people, the accused, on the reversal of the judgment acquitting him, could not be again tried or put in jeopardy for the same offense.¹²

§ 16. *Continued* — **Effect of a Verdict of Guilty of Lesser Offense or upon One of the Count in any Indictment.** — A verdict of guilty on one count of an indictment,¹³ or of guilty of a part of the charges in an indictment, has the effect of an acquittal as

¹ *State v. Kreps*, 8 Ala., 951; *Mount v. State*, 14 Ohio, 295.

² *Shepherd v. People*, 25 N. Y., 407.

³ *Wright v. State*, 5 Ind., 290; *Hines v. State*, 8 Humph., 597.

⁴ *People v. Barrett*, 2 Cai., 304; *U. S. v. Shoemaker*, 2 McLean, 114; *Harker v. State*, 8 Blackf., 540.

⁵ *Rex v. Wade*, 1 Moody, 86; *Reg. v. Onlagnh, Jebb*, 270.

⁶ *Rex v. Kell*, 1 Crawf. & Dix. C. C., 151.

⁷ *Klock v. People*, 2 Park., 672; *U. S. v. Shoemaker*, 2 McLean, 114; *People v. Barrett*, 2 Cai., 304.

⁸ *State v. Garrignes*, 1 Hayw., 241

⁹ 1 Bish. Cr. L., §§ 1014, 1016.

¹⁰ *Brennan v. People*, 15 Ills., 512.

¹¹ 1 Bish. Cr. L., § 1021.

¹² *U. S. v. Salter*, 1 Pin. Wis., 278; *State v. Kemp*, 17 Wis., 669.

¹³ *Stoltz v. People*, 4 Scam., 168; *Chambers v. People*, 4 Scam., 351.

to the other counts or parts of the indictment, even though the verdict is silent as to them.¹ Therefore if on an indictment for murder the accused is found guilty of manslaughter and a new trial is granted him, he cannot be put upon his trial again for murder, but only for manslaughter, for the reason that the former verdict amounted to an acquittal of the charge of murder.² But a conviction of a lesser offense which is included in a greater cannot be plead in bar of a prosecution for the latter.³

§ 17. **What Statutory Offenses Indictable.** — If an act which is not limited in its effect to private persons or private matters,⁴ but affects the public generally, is prohibited⁵ or required to be done⁶ by statute, and no punishment is assigned for doing or omitting to do such act, or if a punishment is assigned and no remedy is provided,⁷ the willfully doing or omitting to do the act is an indictable offense and punishable as a common law misdemeanor.⁸ A subsequent statute assigning a particular punishment for the disobedience will not take away the right to proceed by indictment,⁹ unless by express negative words or by implication.¹⁰ But where the statute creating the offense provides a particular remedy, that remedy alone can be resorted to;¹¹ therefore, where a statute creates an offense and prescribes a penalty recoverable by action, this excludes

¹ *Campbell v. State*, 9 Yerg., 333; *State v. Kittle*, 2 Tyler, 471; *Esmon v. State*, 1 Swan Tenn., 14; *State v. Kattleman*, 35 Mo., 105; and see *State v. Dark*, 8 Blackf., 526; *State v. Martin*, 30 Wis., 216; *State v. Hill*, 30 Wis., 417.

² *Brennan v. People*, 15 Ills., 517; *Barrett v. People*, 54 Ills., 330; *Hurt v. State*, 25 Miss., 378; *State v. Martin*, 30 Wis., 216.

⁴ *Severin v. People*, 37 Ills., 415; *Freeland v. People*, 16 Ills., 380; *Gardner v. People*, 20 Ills., 434; *contra*, see 1 Bish. Cr. L., § 1057.

⁵ 2 Hawk C., 25, § 4.

⁶ *Id.*; R. S., 394, § 278.

⁷ *Rex v. Davis*, Sayer, 133; but see *State v. Williams*, 12 Ind., 172.

⁸ R. S., 394, § 278; 1 Whart. Cr. L., § 10.

⁹ 1 Arch. C. P. & Pl., 3; *State v. Fletcher*, 5 N. H., 257; *Rex v. Sainsburg*, 4 T. R., 451.

¹⁰ *Doug.*, 441, 446; *Rex v. Royal*, 2 Burr., 831; *Rex v. Balme*, Cowp., 648.

¹¹ 1 Arch. C. P. & Pl., 4; *Sweeny v. People*, 28 Ills., 208.

¹² 2 Hawk Ch., 25; § 4.

punishment by indictment.¹ A proceeding to collect a penalty for a town ordinance is a civil suit. Such penalty cannot be recovered in any criminal proceeding.² The fact that the offense charged was an assault and battery does not change the character of the proceeding: it is still a civil suit. The town only acquires jurisdiction because the offense is prohibited by an ordinance.³

¹ *State v. Mazé*, 6 Humph., 17; *Sweeny v. People*, 28 Ills., 208; *Carter v. State*, 16 Wis., 299; *Ewbanks v. Town of Ashley*, 36 Ills., 177.

² *Town of Jacksonville v. Block*, 36 Ills., 507; *Graubner v. City of Jacksonville*, 50 Ills., 87; *Hoyer v. Town of Mascoutah*, 59 Ills., 138; *Hender-shot, v. Town of Petersburg*, 63 Ills., 111.

³ *Hoyer v. Town of Mascoutah*, 59 Ills., 138.

CHAPTER II.

PROCEEDINGS IN CRIMINAL CASES BEFORE JUSTICES OF THE PEACE.

- I. PROCEEDINGS TO PREVENT THE COMMISSION OF CRIMES.
- II. ARREST, EXAMINATION, COMMITMENT, AND BAIL.
 - I. THE COMPLAINT.
 - II. THE WARRANT.
 - III. THE ARREST.
 - 1. UNDER A WARRANT.
 - 2. WITHOUT WARRANT.
 - 3. PROCEEDINGS AFTER THE ARREST.
 - 4. THE RETURN.
 - IV. THE EXAMINATION.
 - V. PROCEEDINGS AFTER EXAMINATION.
- III. SEARCH WARRANTS.

SECTION I.

PROCEEDINGS TO PREVENT THE COMMISSION OF CRIMES.

- § 18. Conservators of the Peace.
- 19. Complaint.
- 20. Warrant.
- 21. Examination.
- 22. When Security Required.
- 23. When Complaint not Sustained—Costs.
- 24. Recognizance.
- 25. Discharge or Commitment.
- 26. Costs.
- 27. Appeal.
- 28. Recognizance of Witnesses.
- 29. Proceedings on Appeal.
- 30. Failing to Prosecute Appeal.
- 31. Discharge on Recognizance after Commitment.
- 32. Recognizance Returned to Circuit Court
- 33. Conviction not Necessary.
- 34. Breach of Peace in Presence of a Court or Magistrate.
- 35. Court may Remit Part of Penalty.
- 36. Sureties may Surrender Principal.

§ 37. Principal may again Recognize.

38. Amendments.

39. Preventing Prize Fighting.

§ 18. **Conservators of the Peace.** — "All judges of courts of record within their respective jurisdictions, and justices of the peace in their respective counties, are conservators of the peace, and shall cause to be kept all laws made for the preservation of the peace, and may require persons to give security to keep the peace, or for their good behavior, or both, as provided by this act."¹

§ 19. **Complaint.** — "When complaint is made to any such judge or justice of the peace that a person has threatened or is about to commit an offense against the person or property of another, he shall examine on oath the complainant and any witness who may be produced, and reduce the complaint to writing, and cause it to be subscribed and sworn to by the complainant."²

FORM OF COMPLAINT FOR USING THREATS AGAINST A PERSON.

State of Illinois, }
Adams County. } ss.

A. B., being duly sworn (*or "affirmed"*) and examined on oath (*or "affirmation"*) before Levi Mason, a justice of the peace in and for said county, complains, and says that on the 10th day of July, A. D. 1874, at the town of Mendon in the said county, C. D. did unlawfully threaten to commit an offense against the person or property of the said A. B., *to wit*: that he would beat (*"wound," "maim," "shoot," or "kill"*) the said A. B. (*or "would burn and destroy the dwelling of him, the said A. B."*)

And E. F., being duly sworn and examined by me on his oath, says that on the — day of —, A. D. 18—, at the residence of James Smith, in the said town of Mendon, he heard the said C. D. threaten to beat the said A. B., and that he, this deponent, has at various times and on divers occasions within the last three months heard the said C. D. swear that he would beat the said A. B. (*These statements must of course be varied according to the facts.*)

A. B.

E. F.

Taken, subscribed and sworn
to before me this — day of }
—, A. D. 18—.

L. M., J. P.

¹ R. S., 398, § 319; *Hamilton v. Stewart*, 59 Ills., 331.

² R. S., 398, § 320.

§ 20. **Warrant.** — “If such judge or justice of the peace is satisfied that there is danger that such offense will be committed, he shall issue a warrant requiring the proper officer to whom it is directed forthwith to apprehend the person complained of, and bring him before such magistrate, or before some other court or magistrate having jurisdiction in the premises.”¹

FORM OF WARRANT IN A PROCEEDING TO PREVENT THE COMMISSION OF CRIME.

State of Illinois, }
 ———, County. } ss.

The People of the State of Illinois to any Constable of the said County,
 Greeting :

Whereas, A. B. has this day made complaint to me the undersigned, a justice of the peace in and for the said county, that C. D. has threatened to commit an offense against the person of him, the said A. B., *to-wit*: that he threatened to beat him the said A. B. (*or insert the facts as stated in the complaint*); and the said A. B. and E. F., having been duly sworn and examined on oath by me, which said complaint and examination have been reduced to writing, subscribed and sworn to by the said A. B., and the undersigned from the said complaint and examination being satisfied that there is danger that such offense will be committed;²

We therefore command you forthwith to apprehend the said C. D. and bring him before the undersigned at his office in the town of Mendon, in said county, or before some other court or magistrate having jurisdiction in the premises, to be dealt with according to law.

Given under my hand and seal this — day of —, A. D. 18—.

LEVI MASON, J. P. [SEAL.]

§ 21. **Examination.**—“When the person complained of is brought before the court or magistrate, if the charge is controverted, the testimony produced on both sides shall be heard.”³

§ 22. **When Security Required.**—All persons whatsoever, being of sane memory, whether natural-born citizens or aliens, have a right to demand surety of the peace. Wives may demand it against their husbands, and husbands against their

¹ R. S., 398, § 321.

² The warrant need not contain a formal adjudication that the magistrate is satisfied that there is danger that such offense will be committed. *Bradstreet v. Ferguson*, 17 Wen., 181; 23 Wen., 638.

³ R. S., 399, § 322.

wives.¹ Formerly married women and infants were supposed to be incapable of binding themselves by a recognizance to keep the peace, for the reason that they were incapable of binding themselves by a contract;² but according to the more recent decisions, and by virtue of a recent statute,³ they may bind themselves by all acts they are obliged by statute or law to do.⁴ Threats by a tenant to kill his landlord if he interfered with the tenant's possession, are no cause for an arrest of the tenant.⁵ The statute does not seem to contemplate having a trial by jury, either before the magistrate or on appeal. Whether this statute, which, in case the accused cannot obtain bail, deprives him of his liberty, is void for the reason that it violates any of the provisions of the Constitution relating to a right to a trial by a jury,⁶ does not seem to have been raised or decided.⁷

§ 23. When Complaint not Sustained — Costs. — “If it appear that there is no just reason to fear the commission of the offense, the defendant shall be discharged; and if the judge or justice of the peace is of the opinion that the prosecution was commenced maliciously, without probable cause, he may give judgment against the complainant for the costs of the prosecution.”⁸

§ 24. Recognizance. — “If, however, there is just reason to fear the commission of such offense, the defendant shall be required to give a recognizance, with a sufficient security, in such sum as the court or magistrate may direct, to keep the

¹ 4 Black. Com., 254; Barb. Cr. L., 513.

² 4 Id.

³ K. S., 576, § 6.

⁴ *People v. Mullen*, 25 Wen., 698; *People v. Moores*, 4 Denio, 518. U. S. v. Bambridge, 1 Mason, 83; *Winslow v. Anderson*, 4 Mass., 376; *Baker v. Lovett*, 6 Mass., 80.

⁵ *Chapman v. Cawry*, 50 Ills., 512.

⁶ R. S., 59, 60; Con., Art. II., §§ 2, 5, 9.

⁷ The right to a trial by jury is fully discussed in the following cases *Wynehamer v. People*, 13 N. Y., 390, 416; *People v. Haws*, 37 Barb., 455-6; *Taylor v. Porter*, 4 Hill, 145-7; *Johnson v. County of Stark*, 24 Ills., 86; *Whitehurst v. Colein*, 53 Ills., 247; *Sullivan v. City of Oneida*, 61 Ills., 243; and see 2 Kent Com., 12, 13; Sedg. on Const. L., 534.

⁸ R. S., 399, § 323.

peace towards all the people of this state, and especially towards the person against whom or whose property there is reason to fear the offense may be committed, for such time, not exceeding twelve months, as the court or magistrate may order. But he shall not be bound over to the next court unless he is also charged with some other offense for which he ought to be held to answer at such court.”¹

FORM OF RECOGNIZANCE TO KEEP THE PEACE.

State of Illinois, }
 ———, County. } ss.

Be it remembered that on the — day of —, A. D. 18—, C. D. of the town of — in the said county, and E. F. and J. F. of the same place, personally came before L. M., a justice of the peace of the said county, and severally and respectively acknowledged themselves to owe and be indebted to the people of the state of Illinois, in the sum of — dollars each, to be levied of their respective goods and chattels, lands and tenements, to the use of the said people, if default shall be made in the condition following:

The condition of this recognizance is such that if the above-bounden C. D. shall keep the peace towards all of the people of this state, and especially towards the said A. B., for — months from the — day of —, A. D. 18—, then this recognizance to be void and of no effect—otherwise to remain in full force and virtue.

Taken, subscribed and acknowledged }
 the day and year first above written, be- }
 fore

C. D. [SEAL.]
 E. F. [SEAL.]
 J. F. [SEAL.]

L. M., J. P.

§ 25. Discharge or Commitment. — “If the person so ordered to recognize complies with the order, he shall be discharged; but if he refuses or neglects, the court or magistrate shall commit him to jail during the period for which he was required to give security, or until he so recognizes, stating in the warrant the cause of the commitment, with the sum and time for which the security was required.”²

¹ R. S., 399, § 324.

² Id., § 325.

FORM OF COMMITMENT ON NEGLECTING TO GIVE RECOGNIZANCE.

State of Illinois, }
 — — County. } ss.

The People of the State of Illinois to the Sheriff, Coroner or any Constable of the said County, Greeting:

Whereas, A. B. lately made complaint to me the undersigned, a justice of the peace in and for the said county, that C. D. had threatened to commit an offense against the person of him the said A. B., *to wit.*: that he had threatened to beat him the said A. B., and the said A. B. and E. F. were duly sworn and examined on oath by me in relation thereto, which said complaint and examination were reduced to writing, subscribed and sworn to by the said A. B., and the undersigned, from the said complaint and examination being satisfied that there was danger that such offense would be committed, caused the said C. D. to be brought before him, and required him, the said C. D., to give a recognizance with sufficient security, in the sum of — dollars, to keep the peace towards all the people of this state, and especially towards the said A. B., for — months from the — day of —, A. D. 18—.

And whereas, the said C. D. has refused and neglected, and now refuses and neglects, to give such a recognizance,—

We therefore command you, the said constable, forthwith to convey the said C. D. to the common jail of the said county and deliver him to the keeper thereof; and you the said keeper are hereby required to receive the said C. D. into your custody in the said jail and him there safely keep for —¹ months from the — day of —, A. D. 18—, or until he so recognizes. (*"In case the defendant is required to pay costs, add "and until the sum of — costs of prosecution shall be paid, or he is otherwise legally discharged."*)

Given under my hand and seal, this — day of —, A. D. 18—.

L. M., J. P. [SEAL.]

§ 26. *Costs.* — "When a person is required to give security to keep the peace, or for his good behavior, the court or magistrate may further order that the costs of the prosecution, or any part thereof, shall be paid by such person, who shall stand committed until the costs are paid, or he is otherwise legally discharged."²

§ 27. *Appeal.* — "Whoever is aggrieved, by the order of the magistrate requiring him to recognize as aforesaid, may, on giving the security required, appeal to the next term of the circuit court to be held in the same county (except that in the

¹ A commitment for an unlimited time, or for more than twelve months, is void. Barb. Cr. L., 511.

² R. S., 399, § 326.

county of Cook the appeal shall be taken to the criminal court of Cook county). Such recognizance shall, in case of an appeal, contain a condition that the appellant will pay the costs of the appeal in case the order is affirmed or the appeal dismissed.”¹

FORM OF RECOGNIZANCE ON APPEAL IN A PROCEEDING TO PREVENT THE
COMMISSION OF CRIME.

State of Illinois, }
——— County. } ss.

Be it remembered that on the —— day of ——, A. D. 18—, C. D. of the town of —— in the said county, and E. F. and I. J., of the same place, personally came before L. M., a justice of the peace in and for the said county, and severally and respectively acknowledged themselves to owe and be indebted to the people of the state of Illinois, in the sum of ——dollars each to be levied of their respective goods and chattels, lands and tenements, to the use of the said people if default shall be made in the condition following:

Whereas, L. M., a justice of the peace in and for the county of —— and state of Illinois, in pursuance of the statutes in such case made and provided, did on the —— day of ——, A. D. 18—, order and require the above-bounden C. D. to give a recognizance with a sufficient security in the sum of —— dollars, to keep the peace towards all the people of this state, and especially towards A. B., for —— months from the —— day of ——, A. D. 18—, from which order the said C. D. has taken an appeal to the circuit court of the said county,—

Now therefore the condition of this recognizance is such that if the said appellant C. D. shall pay the costs of the appeal in case the said order is affirmed or the appeal dismissed, and shall also keep the peace towards all the people of this state, and especially towards the said A. B., for —— months from the —— day of ——, A. D. 18—, then this recognizance to be void and of no effect—otherwise to remain in full force and virtue.

C. D. [SEAL.]

E. F. [SEAL.]

I. J. [SEAL.]

Taken, subscribed and acknowledged }
before and approved by me on the day }
and year first above written. }

L. M., J. P.

§ 28. *Recognizance of Witnesses.* — “The court or magistrate shall, when necessary, require the witnesses to support the complaint to recognize for their appearance at the court appealed to.”²

¹ R. S., 399, § 327.

² Id., § 328.

FORM OF RECOGNIZANCE OF WITNESS IN A PROCEEDING TO PREVENT THE
COMMISSION OF CRIMES.

State of Illinois, } ss.
——— County. }

Be it remembered that on the — day of —, A. D. 18—, E. F., of the town of —, in the said county, personally came before L. M., a justice of the peace in and for the said county, and acknowledged himself to owe and be indebted to the people of the state of Illinois in the sum of — dollars, to be made and levied of his goods and chattels, lands and tenements, to the use of the said people, if default shall be made in condition following:

The condition of this recognizance is such that if the said E. F. shall personally be and appear at the next term of the circuit court to be held in and for the said county of — and state of Illinois, on the — day of —, A. D. 18—, at —, in said county, on the first day thereof, and from day to day, and from term to term, and from day to day of each term, until the final sentence or order of the court to give evidence in behalf of the said people against C. D. for threatening to commit an offense against the person of A. B., and not depart the court without leave, then this recognizance to be void—otherwise to remain in full force and effect.

A. B.

Taken, subscribed and acknowledged }
before and approved by me on the day }
and year first above written. }

L. M., J. P.

§ 29. *Proceedings on Appeal.* — “The court before which the appeal is prosecuted may affirm the order or discharge the appellant, or may require him to enter into a new recognizance, with sufficient sureties, in such sum and for such time as the court deems proper, and may make such order in relation to the costs or prosecution as may be deemed just and reasonable.”¹

§ 30. *Failing to Prosecute Appeal.* — “If the appellant fails to prosecute his appeal, his recognizance shall remain in full force and effect as to any breach of the conditions, without an affirmance of the judgment or order of the magistrate, and shall also stand as his security for any costs which the court appealed to orders to be paid by the appellant.”²

§ 31. *Discharge on Recognizance after Commitment.* — “A person committed for not finding sureties, or refusing to recognize as required by the court or magistrate, may be dis-

¹ R. S., 399, § 329.

² Id., § 330.

charged by any judge or justice of the peace of the county, on giving such security as was required.”¹

FORM OF DISCHARGE AFTER COMMITMENT.

State of Illinois, }
 _____ County. } ss.

The People of the State of Illinois to the Keeper of the Common Jail of the said County:

Whereas, C. D., who is now in the common jail of your county in your custody for not giving a recognizance with sufficient security in the sum of — dollars, to keep the peace towards all the people of this state, and especially towards A. B., for — months from the — day of —, A. D. 18—, has given before me the undersigned, a justice of the peace in and for said county, such a recognizance;

We therefore command you that if the said C. D. now remains in the said jail for the said cause, and none other, then you forbear to detain him any longer, and that you deliver him thence and suffer him to go at large.

Given under my hand and seal this — day of —, A. D. 18—.

L. M., J. P. [SEAL.]

§ 32. **Recognizance Returned to Circuit Court — How Prosecuted.** — “Every recognizance taken in pursuance of the foregoing provisions shall be transmitted by the magistrate to the circuit court of the county (except that in the county of Cook it shall be transmitted to the criminal court of Cook county) by the first day of the next term, and shall be filed of record by the clerk, and upon a breach of the condition the same shall be prosecuted by the state’s attorney.”²

§ 33. **Conviction not Necessary.** — “In proceeding upon a recognizance it shall not be necessary to show a conviction of the defendant of an offense against the person or property of another.”³

§ 34. **Breach of the Peace in Presence of a Court or Magistrate.** — “A person who in the presence of a court or magistrate commits or threatens to commit an offense against the person or property of another, may be ordered without process to enter into a recognizance to keep the peace for a term not exceed-

¹ R. S., 399, § 331.

² Id., § 332.

³ Id., 400, § 333.

ing twelve months, and in case of refusal be committed as in other cases."¹

§ 35. **Court may Remit Part of Penalty.** — "When upon a suit brought upon a recognizance the penalty thereof is adjudged forfeited, the court may, on the petition of the defendant, remit such portion of it as the circumstances of the case render just and reasonable."²

§ 36. **Sureties may Surrender Principal.** — "The sureties of any person bound to keep the peace may at any time surrender their principal to the sheriff of the county in which the principal was bound, under the same rules and regulations governing the surrender of the principal in other criminal cases."³

§ 37. **Principal may again Recognize.** — "The person so surrendered may recognize anew, with sufficient sureties, before any judge or justice of the peace of the county, for the residue of the time, and shall thereupon be discharged."⁴

§ 38. **Amendments.** — "No proceeding to prevent a breach of the peace shall be dismissed on account of any informality or insufficiency of the complaint, or any writ or proceeding; but the same may be amended by order of the court or magistrate to conform to the truth in the case."⁵

§ 39. **Preventing Prize Fighting.** — "Any person who shall upon complaint made before any judge or justice of the peace appear to be about to engage in such fight or sparring or boxing exhibition, may be compelled to enter into bond with security to keep the peace, as in other cases of threatening breaches of the peace."⁶

¹ R. S., 400, § 334.

² Id., § 335.

³ Id., § 336.

⁴ Id., § 337.

⁵ Id., § 338.

⁶ Id., 388, § 236.

SECTION II.

ARREST, EXAMINATION, COMMITMENT AND BAIL.

- § 40. What Magistrates may Examine Offenders.
- 41. Complaint.
- 41a. Who should make the Complaint.
- 42. When a Person is Liable for Making a Complaint.
- 43. Who Qualified to be a Complainant.
- 44. Requisites of the Complaint.
- 45. What must be Stated in the Complaint.
- 46. Effect of Issuing a Warrant without a Sufficient Complaint.
- 47. Provisions of the Statute Relating to the Warrant.
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I. THE COMPLAINT.

§ 40. **What Magistrates may Examine Offenders.** — The statute provides that “for the apprehension of persons charged with offenses, except such as are cognizable exclusively by justices of the peace, any judge of a court of record, in vacation as well as in term time, or any justice of the peace, is authorized to issue process to carry into effect the following provisions of this act.”¹

§ 41. **Complaint.** — “Upon complaint made to any such judge or justice of the peace that any such criminal offense has been committed, he shall examine on oath the complainant and any witness produced by him, shall reduce the complaint to writing and cause it to be subscribed and sworn to by the complainant; which complaint shall contain a concise statement of the offense charged to have been committed, and the name of the person accused, and that the complainant has just and reasonable grounds to believe that such person committed the offense.”²

§ 41a. **Who should make the Complaint.** — Offenses ordinarily affect some more than others, and it is therefore usual for such as are immediately injured to complain.³ It is, however,

¹ R. S., 401, § 347.

² Id., § 348.

³ 1 Chitty Cr. L., 1, 2

not only the right,¹ but the duty,² of every man competent to enter a complaint, knowing that another has committed an offense, to prefer a complaint against him. And our statute makes every person not standing in the relation of husband or wife, parent or child, who knows that a crime has been committed and conceals it from the magistrate, an accessory after the fact, and punishes him accordingly.³ But at common law a person who merely neglected to arrest a felon, or to make known that a felony had been committed, was not an accessory after the fact.⁴

§ 42. When a Person is Liable for Making a Complaint. — The law encourages the performance of the duty of making a complaint by insuring to the complainant all due protection in the discharge of such duty.⁵ There can be no recovery in an action against a person for complaining of or indicting a party, even though the complainant is mistaken as to the guilt of the accused,⁶ unless his proceedings were actuated by malice and were entirely destitute of any probable cause.⁷ Even if the complainant is actuated by malice, he will not be liable to an action if there was a probable cause for a prosecution.⁸ The rule is quite as strict, if not more so, in shielding him from an action of slander for the charges made in the form of a complaint.⁹ Probable cause is defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in

¹ 1 Chitty Cr. L., 1, 2.

² Barb. Cr. L., 515.

³ R. S., 393, § 276.

⁴ 1 Bish. Cr. L., § 694; 1 Hale, 371, 618; *contra*, Barb. Cr. L., 515.

⁵ Barb. Cr. L., 515.

⁶ *McBean v. Richie*, 18 Ills., 114; *Israel v. Brooks*, 23 Ills., 575; *Thorpie v. Balliet*, 25 Ills., 339.

⁷ *Leidg v. Rawson*, 1 Scam., 273; *Jacks v. Stimpson*, 13 Ills., 702; *McBean v. Richie*, 17 Ills., 63, 18 Ills., 114; *Israel v. Brooks*, 23 Ills., 575; *Ross v. Innis*, 26 Ills., 259; 35 Ills., 487; *Chapman v. Cawrey*, 50 Ills., 512; *Collins v. Hayte*, 50 Ills., 337; *Bourne v. Stout*, 62 Ills., 261; *Comstock v. Wood*, 50 Ills., 352; *Collins v. Fisher*, 50 Ills., 359.

⁸ *McBean v. Richie*, 18 Ills., 114; *Ross v. Innis*, 35 Ills., 487; *Chapman v. Cawrey*, 50 Ills., 512.

⁹ Barb. Cr. L., 515.

themselves to warrant a cautious man in the belief that the person accused is guilty of the offense charged.¹ The mere belief of the prosecutor that he had good cause for commencing criminal proceedings, is not a sufficient defense to such an action, if all the facts and circumstances under which he acted clearly show that there was no probable cause for his acts, and that his belief was groundless and could not have been formed without the grossest ignorance and negligence.² If he has fully and fairly stated all the facts known to himself to one learned in the law, and acts under his advice, this will go far to negative malice.³ The law does not presume malice or want of probable cause merely because a party has been prosecuted and acquitted,⁴ although no action for a malicious prosecution can be sustained until the party is acquitted or the suit is otherwise disposed of.⁵

§ 43. **Who Qualified to be a Complainant.** — Formerly it was questionable whether an infamous person, or one disqualified to take an oath, could act as complainant, for the reason that he was incompetent to swear to the complaint, as required by the statute.⁶ But under our present statute an infamous person; of sound mind and of sufficient age and capacity, is qualified to be a witness,⁷ and, therefore, may be a complainant. A justice, however, should in no case receive a complaint sworn to by a person disqualified from being a witness by insanity, idiocy, drunkenness or want of age;⁸ though as to infants, if they understand the nature and obligations of an oath, they may be sworn, no matter how young, and their

¹ *Ross v. Innis*, 26 Ills., 259; 35 Ills., 487; *Chapman v. Cawrey*, 50 Ills., 512; *Bourne v. Stout*, 62 Ills., 262.

² *Jacks v. Stimpson*, 13 Ills., 702; *Hurd v. Shaw*, 20 Ills., 354; *Richey v. Bean*, 17 Ills., 65.

³ *Ross v. Innis*, 26 Ills., 259; *Collins v. Hate*, 50 Ills., 337.

⁴ *McBean v. Richie*, 18 Ills., 114; *Israel v. Brooks*, 23 Ills., 575; *Thorprie v. Balliet*, 25 Ills., 339.

⁵ *Hurd v. Shaw*, 20 Ills., 356; *Gilbert v. Emmons*, 42 Ills., 142.

⁶ *Chitty Cr. L.*, 2, 3; *Barb. Cr. L.*, 516; 1 *Bish. Cr. L.*, § 232; *State v. Killet* 2 *Bailey*, 289; *Walker v. Kearny*, 2 *Stra.*, 1148.

⁷ *R. S.*, 410, § 426.

⁸ *Livingston v. Kinsted*, 10 *John.*, 362; *Hartford v. Palmer*, 16 *John.*, 143.

credit is to be determined by the magistrate.¹ The justice should not act in a case if he sees no credit should be given to either the complainant or his witnesses,² except it may be necessary to give protection, which the law affords to every man, whether entitled to be believed on oath or not.³

§ 44. *Requisites of the Complaint.* — The Constitution provides that “no warrant shall issue without probable cause supported by affidavit particularly describing the place to be searched and the person or thing to be seized.”⁴ The word “affidavit” means a sworn statement in writing of one or more matters of fact sworn to before some authorized officer, usually signed by the person making it.⁵ It seems, then, that the Constitution, as well as the statute, requires the complaint to be in writing and to be sworn to, and the statute requires it to be subscribed by the complainant and to “contain a concise statement of the offense charged to have been committed and the name of the person accused, and that the complainant has just and reasonable grounds to believe that such person committed the offense.”⁶ And unless the complaint shows the facts required by the Constitution and the statute, the magistrate will not acquire jurisdiction to issue the warrant.⁷ It has been held necessary that a written complaint be made setting out the offense, even when the accused is brought before the magistrate without a warrant.⁸ The same precision proper to be observed in an indictment is not

¹ Barb. Cr. L., 518.

² Id.

³ Id.; *State v. Killet*, 2 Bailey, 289; *Com. v. Oldham*, 1 Dana, 466; see also *State v. Roth*, 17 Iowa, 336.

⁴ R. S., 59, Con., Art. II., § 6; *Sullivan v. City of Oneida*, 61 Ills., 243

⁵ Burrill Law Dic., 66.

⁶ R. S., 401, § 348.

⁷ *Flach v. Harrington*, Breese, 165, 2d Ed., 213; *Moore v. Watts*, Breese, 42; *Gorton v. Frizzell*, 20 Ills., 291; *Tuttle v. Wilson*, 24 Ills., 559; *Parker v. Follensbee*, 45 Ills., 478; *Myers v. People*, 67 Ills., 504.

⁸ 1 Bish. Cr. L., § 179; *Tracy v. Williams*, 4 Conn., 107.

required in the complaint¹ if all the facts which constitute the offense are substantially stated.²

§ 45. **What Must be Stated in the Complaint.** — In a complaint for feloniously taking property, the value of the property and the place where the offense arose should be stated, or the complaint will be insufficient;³ but stating the offense to have been committed in the town of S., without adding the county in which the same was situated, was held in New York sufficient to give the magistrate jurisdiction, for the courts will take judicial notice of towns created by law.⁴ A warrant issued upon an affidavit stating that C. D. entered the enclosure of A. B. and carried off her grain, was held to be no justification to the officer who issued it, for the reason that the affidavit contained no words importing a felony.⁵ It has been held that a magistrate has no jurisdiction to issue a warrant in a criminal case upon a complaint, the facts of which are stated entirely on information and belief, if the person from whom the information comes can be procured; and if the magistrate issues a warrant in such case, the magistrate and the complainant are jointly liable to an action for false imprisonment.⁶ A warrant cannot issue against one if his guilt appears to the magistrate only from hearsay and mere rumor, even if it be alleged that the accused will escape before the necessary affidavit showing his guilt can be obtained.⁷

§ 46. **Effect of Issuing a Warrant Without a Sufficient Complaint.** — It is important that the complaint should state sufficient facts to give the magistrate jurisdiction, for while the statute provides that the accused shall not be discharged on

¹ 2 Hilliard on T., 188; *Alexander v. Card*, 3 R. I., 145; *Ford v. State* 4 Chand., 148.

² 1 Chitty Cr. L., 33; 1 Arch. C. P. & Pl., 122; 1 Bish. Cr. P., § 720; *Gallagher v. State*, 26 Wis., 423.

³ *Howell v. People*, 2 Hill, 281; *contra*, *Payne v. Barnes*, 5 Barb., 465.

⁴ *Vanderwerker v. People*, 5 Wen., 530; *Dickinson v. Breeden*, 30 Ills., 279; *County of Rock Island v. Steele*, 31 Ills., 543.

⁵ *Moore v. Watts*, Breese, 18, 2d Ed., 42.

⁶ *Comfort v. Fulton*, 13 Abbott N. Y. R., 276.

⁷ 1 Arch. C. P. & Pl., 120, note; *Conner v. Com.*, 3 Binn., 38.

account of any insufficiency or informality in the complaint or warrant,¹ it does not prevent the magistrate from being liable for issuing a warrant without first acquiring jurisdiction. If he issues a warrant not supported by a complaint or affidavit, showing probable cause,² and containing a concise statement of the offense,³ or without any complaint or affidavit whatever,⁴ such warrant is void for want of jurisdiction, and the magistrate, the prosecutor and all others will be liable for all acts done under or by virtue of such process.⁵ If, however, such void process is regular on its face and the magistrate issuing it had jurisdiction of the subject matter, it will protect the officer executing it,⁶ and those acting under him,⁷ without notice that it was issued without jurisdiction.⁸ But where the complaint shows facts sufficient to give the magistrate a right to adjudicate upon the question as to the propriety of issuing the warrant, and he has observed the preliminaries required to obtain jurisdiction, no mere error of opinion or judgment will render him liable.⁹ He is bound to decide in such case, and unless he acts corruptly it would be against both policy and justice if the law should allow him to be punished because he did not decide rightly.¹⁰ Where the magistrate acts in bad faith and grants a warrant against an innocent man upon an oath of facts and circumstances affording no

¹ R. S., 407, § 359; but see *Torry v. People*, 17 Ills., 105.

² R. S., 59, Con., Art. II., § 6; *Baldwin v. Hamilton*, 3 Wis., 747; but see *Payne v. Barnes*, 5 Barb., 465.

³ R. S., 401, § 348; *Fink v. City of Milwaukee*, 17 Wis., 27; *Carter v. Dow*, 16 Wis., 299.

⁴ Barb. Cr. L., 522; *Flack v. Harrington*, Breese, 165, 2d Ed., 213.

⁵ *Moore v. Watts*, Breese, 18, 2d Ed., 42; *Comfort v. Fulton*, 13 Abbott, N. Y. Pr. R., 276; *Hull v. Blaisdell*, 1 Scam., 332; *Stolberg v. Ohnmacht*, 50 Ills., 442; *Von Kettler v. Johnson*, 57 Ills., 109.

⁶ *Lattin v. Smith*, Breese, 361; *Barnes v. Barber*, 1 Gilm., 401; *Parker v. Smith*, 1 Gilm., 414; *Taft v. Ashbaugh*, 13 Ills., 602; *Tuttle v. Wilson*, 24 Ills., 561; *Stafford v. Low*, 20 Ills., 152.

⁷ 2 Hilliard on T., 232, 235, 323; *Page v. De Puy*, 40 Ills., 506.

⁸ *Barnes v. Barber*, 1 Gilm., 401; *McDonald v. Wilkie*, 13 Ills., 25.

⁹ Barb. Cr. L., 522; *Carter v. Dow*, 16 Wis., 299.

¹⁰ Id.; *Yates v. Lansing*, 5 John., 282; *Butler v. Porter*, 17 John., 145; *Flack v. Ankeny*, Breese, 144, 2d Ed., 147; *Lancaster v. Lane*, 19 Ills., 242.

rational ground of suspicion whatever, he will doubtless subject himself to an action.¹

GENERAL FORM OF COMPLAINT.

State of Illinois,² }
 ——— County.³ } ss.⁴

A. B., of the town of ———, in the said county, complains to L. M., a justice of the peace in and for the said county, and being duly sworn and examined on his oath by and before the said justice, states that he has just and reasonable grounds to believe⁵ that C. D.⁶ did, on the⁷ ——— day of ———,

¹ 1 Chitty Cr. L., 34.

² It is customary, if not necessary, to insert the name of the state and county in the margin. R. S., 408, § 408. But it has been held there is no need of inserting the name of the state in the margin or in any other part of an indictment. *State v. Jordon*, 12 Texas, 205; *State v. Lane*, 4 Ired., 113; *Mitchell v. State*, 8 Yerg., 514; *Kirk v. State*, 6 Mo., 469; *Com. v. Quin*, 5 Gray, 478; *State v. Wentworth*, 37 N. H., 196; *Taft v. Com.*, 8 Leigh, 721.

³ If the name of the county is stated in the body of an indictment, it may be omitted in the margin. 1 Bish. Cr. P., 377; *Taft v. Com.*, 8 Leigh, 721; *Com. v. Quin*, 5 Gray, 478. If the name of the county is stated in the margin, but omitted in the body of the indictment, the defect is cured by a verdict. *Nichols v. People*, 40 Ills., 395.

⁴ The letters "ss" mean *to wit*., and are unnecessary. *U. S. v. Grush*, 5 Mason, 290.

⁵ The words "he has just and reasonable grounds to believe" are necessary in a complaint; R. S., 401, § 348; *State v. Dale*, 3 Wis., 795; but should not be inserted in an indictment. R. S., 408, § 408.

⁶ The statute requires that the name of the accused should be stated if known; if not, the fact must be so stated. *Willis v. People*, 1 Scam., 399; *Scheer v. Keown*, 29 Wis., 586; and then he may be designated by any name, description or circumstances by which he can be identified with reasonable certainty. R. S., 401, §§ 348, 350.

⁷ The day, month and year must be stated. 1 Bish. Cr. P., § 387; *State v. Baker*, 34 Me., 52; *State v. Offutt*, 4 Blackf., 387; *Erwin v. State*, 13 Mo., 306; *Whitesides v. People*, Breese, 4, 2d Ed., 21; though it is not necessary to prove the precise day or year as alleged. 1 Chitty, Cr. L., 223; *Gibhart v. Adams*, 23 Ills., 399; *Koop v. People*, 47 Ills., 327; *People v. Stanvord*, 9 Cowen, 655. Where the time is set down as on or about the day mentioned the allegation is insufficient in an indictment. 1 Bish. Cr. P., § 390; *Manzau-man-ne-kah v. United States*, 1 Pin. Wis., 124; *Hampton v. State*, 8 Ind., 336; *U. S. v. Crittenden*, Hemp., 61, *contra*, *Cokely v. State*, 4 Iowa, 477; although this is sufficient in a complaint before a justice. *Rawson v. State*, 19 Conn., 292; but see *Com. v. Hutton*, 5 Gray, 89; *Com. v. Blake*, 12 Allen, 188. The words "at divers other days" may be rejected as surplusage and do not invalidate the complaint. *Gallagher v. State*, 26 Wis., 423.

A. D.¹ 18—², at the town³ (or “city”) of——, in the county aforesaid.⁴
(Here insert statement of the offense⁵ as in the forms given. If the offense did not

¹ An indictment is bad which does not aver the year to be the year of our Lord. *Whitesides v. People*, Breese, 4, 2d Ed., 21; but the letters “A. D.” sufficiently designate the year of our Lord. *State v. Hodgeden*, 3 Vt., 481; *State v. Gilbert*, 13 Vt., 647. So the words “Anno Domini,” written in full, are sufficiently English. *State v. Gilbert*, 13 Vt., 647; also the words “in the year,” without adding “of our Lord” have been held to refer to the Christian era, and therefore to be adequate. *Hall v. State*, 3 Kelley, 18, 22; *Engleman v. State*, 2 Ind., 91; *Com. v. Doran*, 14 Gray, 37.

² Figures may be used in an indictment. 1 Bish. C. P., § 345; *State v. Reed*, 35 Me., 489; *State v. Seamons*, 1 Greene, 418; *Winfield v. State*, 3 Greene, 339; *State v. Tuller*, 34 Conn., 280; *contra*, *Berrian v. State*, 2 Zab., 9; *State v. Voshall*, 4 Ind., 589; *Finch v. State*, 6 Blackf., 533; 2 Hale P. C., 170.

³ As a general rule it is not necessary to allege the particular town or other locality. It is sufficient to allege that it was within the county. *People v. Higgins*, 15 Ills., 110; *Haskins v. People*, 16 N. Y., 344; *Dillon v. State*, 9 Ind., 408; *State v. Goode*, 24 Mo., 361. There are some exceptions to this rule, extending to cases which are of a local nature. 1 Bish. Cr. P., 372; *Norris House v. State*, 3 Greene Iowa, 513; but see *Jenks v. State*, 17 Wis., 665; *Zumoff v. State*, 4 Greene Iowa, 526; as arson, *People v. Slater*, 5 Hill, 401; burglary, etc., 2 Arch., C. P. & Pl., 265; and where the jurisdiction of the court extends over a space less than the county. 1 Bish. Cr. P., § 375. An allegation that the offense was committed in one town is supported by proof that the offense was committed in another town or village in the same county except in cases of a local nature. 1 Bish. Cr. P., § 371; *contra*, *State v. Crogan*, 8 Iowa, 523; *Moore v. State*, 12 Ohio, 387.

⁴ The words “in the county aforesaid” are sufficient without repeating the name of the county. 1 Bish. Cr. P., §§ 378, 379; *State v. Ames*, 10, Mo., 743; *Rex v. Kelderly*, 1 Saund. (Wms. Ed.), 308; *Barnes v. State*, 5 Yerg., 186; *State v. Wentworth*, 37 N. H., 196; *Noe v. People*, 39 Ills., 96. If the allegation is that the defendant committed the crime “at” instead of “in” the county, it is sufficient. *Augustine v. State*, 20 Texas, 450.

⁵ It is sufficient to state the offense in the terms and language of the statutes creating it; *Miller v. People*, 2 Scam., 233; *Quigley v. People*, 2 Scam., 201; *Jones v. People*, 2 Scam., 477; *Chambers v. People*, 4 Scam., 351; *Eells v. People*, 4 Scam., 498; *People v. Baughman*, 18 Ills., 153; *Mohler v. People*, 24 Ills., 26; *Cannady v. People*, 17 Ills., 159; *Morton v. People*, 47 Ills., 467; *State v. DeLue*, 2 Pin. Wis., 204; or so plainly that the nature of the offense may be easily understood by the jury. R. S., 408, § 408; *Connolly v. People*, 3 Scam., 474; *Eells v. People*, 4 Scam., 498; *Swain v. People*, 4 Scam., 178; *Chambers v. People*, 4 Scam., 351; *Cross v. People*, 47 Ills., 152. If a statute creates an offense, or changes a common law offense, or alters the punishment, to inflict the statutory punishment, its language must be pursued in describing the offense. *Clark v. People*, 1 Scam., 119; *Curtis v. People*, 1 Scam., 285; *Perry v. People*, 14 Ills., 499.

exist at common law, but is created by statute, or changed by statute, add¹—if not, omit—the following words: “contrary to the form² of the statute³ in such case made and provided.”)

And the said A. B., being further examined by the said justice, on his oath, says⁴ that the said offense has been committed, and that the following are the grounds of this deponent's belief that the said C. D. committed the same. (*Here insert statement of such facts as are known to the complainant, showing probable cause and the grounds of his belief.*)

And E. F.,⁵ a witness produced by the said complainant, being sworn and examined by the said justice on his oath, says (*here insert such facts as the witness knows in relation to the offense.*)

¹ If the offense is created or changed from a lower to a higher grade by statute, an indictment must conclude against or contrary to the form of the statute or statutes, etc. 1 Stark. C. Pl., 2d Ed., 229; *People v. Enoch*, 13 Wen., 159; *Chapman v. Com.*, 5 Whart., 427; *State v. Gove*, 34 N. H., 510; *Rex v. Dickenson*, 1 Saund. R., 135a, note. Where the offense existed at common law, and an additional punishment is inflicted by statute, the offender, if the conclusion against the statute is omitted, is, according to some authorities, liable to the common law punishment, but not to the new penalty under the statute. 1 Stark. Cr. Pl., 229; 1 Chitty Cr. L., 290. But the weight of authority in such case seems to be in favor of inflicting the statute penalty. *R. S.*, 395, 292; *State v. Steadman*, 7 Port, 495; *State v. Burt*, 25 Vt., 373; *Bennett v. State*, 3 Ind., 167. If a statute be merely declaratory of an offense at common law, an indictment for the offense may conclude against the statute or as at common law. 1 Arch. C. P. & Pl., 306; 1 Bish. Cr. P., § 599; *Fuller v. State*, 1 Blackf., 63. If the conclusion is against the form of the statute, the accused cannot be convicted of any but a statutory offense. *Town of Paris v. People*, 27 Ills., 74; *contra*, 1 Bish. Cr. P., § 601, 607, and numerous authorities there cited. *Com. v. Kennedy*, 15 B. Monr., 531.

² The omission of the word “form” has been held not to be a fatal defect. *Com. v. Caldwell*, 14 Mass., 330; 1 Bish. Cr. P., 603.

³ Where the offense is created by several statutes, it is proper, if not necessary, to conclude against the statutes in the plural. *State v. Moses*, 7 Blackf., 244; *State v. Dayton*, 3 Zab., 49; 1 Bish., Cr. P., §§ 605, 606.

⁴ The statute does not seem to require that the examination of the complainant and of the witnesses produced by him should be reduced to writing. *R. S.* 401, § 348. But the Constitution provides that “no warrant shall issue without probable cause, supported by affidavit.” *R. S.*, 59, Con., Art. II., § 6. Therefore it would seem to be necessary to reduce enough of the evidence to writing, either in the form of an affidavit or in the complaint, to show probable cause.

⁵ If the complainant can swear to facts enough of his own knowledge to show probable cause for issuing the warrant, it is not necessary to produce any additional witnesses.

Wherefore the said A. B. prays a warrant may issue against the said C. D. according to law.

A. B.

E. F.

Taken, subscribed and sworn ("or affirmed") to }
before me this — day of —, A. D. 18—. }
L. M., J. P.

FORM OF COMPLAINT WHERE THE NAME OF THE ACCUSED IS UNKNOWN.

State of Illinois, }
— County. } ss.

A. B., of the town of —, in said county, complains to L. M., a justice of the peace in and for said county, and being duly sworn and examined on his oath by and before the said justice, states that he has just and reasonable grounds to believe that a certain man, whose name is unknown, but whose person is well known, and who is employed as a driver of cattle, wears a white hat and has lost his eyesight (*or insert such other description as corresponds with the facts*¹) did on, etc., at, etc.

(*Conclude as in previous form.*)

II. THE WARRANT.

§47. **Provisions of the Statute Relating to the Warrant — Witnesses.** — The statute provides that "if it appears that such offense has been committed, the judge or justice of the peace shall issue a warrant, directed to all sheriffs, coroners and constables within this state, stating the offense by name, or so that it can be clearly inferred, the name of the person accused, and requiring the officer to whom it is directed forthwith to take the person of the accused and bring him before such judge or justice; or, in case of his absence or inability to act, before any other judge or justice of the county, and in the same warrant may require the officer to summon such witnesses as shall be therein named to appear and give evidence on the examination."²

§48. **Requisites of the Warrant.** — The warrant must be in writing, be in the name of the people of the state of Illinois³ and

¹ It is not sufficient to give him a name, adding the word "alias." *Scheer v. Keown*, 29 Wis., 586.

² R. S., 401, § 349.

³ R. S., 73, Con. of Ills., Art. VI., § 33.

be under the hand and seal¹ of the magistrate.² If, however, it is not under seal, the statute provides that the accused shall not be discharged on that account, but the warrant may be amended by the judge or justice of the peace at any time pending the proceedings.³ It ought to set forth the day and year when it is issued, but the place where issued need not be expressed in the warrant, except in the margin, if not set forth in the body of the warrant.⁴ It must state the offense by name, or so that it can be clearly inferred;⁵ but the same particularity and technical accuracy is not required in a warrant, mittimus, or recognizance as in an indictment;⁶ and it need not be returnable at any particular time or place, and continues in force until it is fully executed and obeyed.⁷ It must not be left in blank to be filled up by the officer or party, and if the name of the officer or party be inserted without authority after the issuing of the warrant, the arrest will be illegal and the person executing it will not be protected in proceeding under it.⁸ But it may be filled up by the magistrate himself after he has signed it before he delivers it over to the officer.⁹ And it should not be general to apprehend all persons suspected, but should direct the officer to apprehend some particular individual; otherwise it will be void.¹⁰

¹ Under a former statute a seal was not necessary. T. S., &c., Stat., 415, § 210. But this statute is now repealed, so that the statute is now silent on the point in which case the authorities as to whether a seal is necessary or not, are conflicting. 1 Bish. C. P., § 227. The weight of authority seems to be in favor of requiring a seal. *Welsh v. Scott*, 5 Ired., 72; *Lough v. Millard*, 2 R. I., 436; *State v. Drake*, 36 Me., 366; *Tackert v. State*, 3 Yerg., 392; *contra*, *State v. Vaughn Harper*, 313; *Thompson v. Fellows*, 1 Fost. N. H., 425; *Foss v. Isett*, 4 Greene Iowa, 76, 425; *Davis v. Clements*, 2 N. H., 390.

² 1 Chitty Cr. L., 38.

³ R. S., 402, § 359.

⁴ 1 Chitty Cr. L., 38.

⁵ R. S., 401, § 349.

⁶ *Young v. People*, 18 Ills., 566; *Besmeir v. People*, 15 Ills., 440; *People v. Blankman*, 17 Wen., 255; *Thomas v. People*, 13 Ills., 696.

⁷ 1 Chitty Cr. L., 39; *Barb. Cr. L.*, 527.

⁸ 1 Nun. & Walsh, 188; *Barb. Cr. L.*, 528.

⁹ *Barb. Cr. L.*, 528.

¹⁰ *Id.*, 524; 1 Arch. C. P. & Pl., 126; *Wells v. Jackson*, 3 Munf., 458.

§ 49. *Name of the Accused, how Designated.* — The name of the person to be apprehended should be accurately stated if known.¹ If the name inserted be not the right one, or be fictitious merely, the arrest cannot be justified, even though the person arrested be the one intended, unless he is known as well by the name in the warrant as by his true name.² And if the officer makes an arrest under such circumstances he will be liable to an action for false imprisonment.³ But the statute provides that “if the name of the defendant is unknown to the complainant or judge or justice of the peace, he may be designated by any name, description or circumstances by which he can be identified with reasonable certainty, and if upon arrest he refuses to disclose his true name he may be tried and convicted by the name used in the warrant.”⁴ Prior to the statute a warrant to apprehend “_____ Hood,” omitting his Christian name, “of B. in the parish of F., by whatsoever name he may be called or known, the son of Samuel Hood, to answer,” etc., was held defective as omitting the Christian name and assigning no reason for the omission nor giving any distinguishing particulars of the individual.⁵ So a description of A. and his associate was held void as to the latter.⁶

GENERAL FORM OF A WARRANT AND SUBPOENA.

State of Illinois, }
 _____ County. } ss.

The People of the State of Illinois to all Sheriffs, Coroners and Constables of the said State, Greeting:

Whereas, A. B. has this day made complaint to L. M., a justice of the peace in and for the said county, and the said justice, having examined on oath the said complainant, and E. F., a witness produced by him, and re-

¹ 1 Chitty Cr. L., 39; Scheer v. Keown, 29 Wis., 586.

² 1 Arch. C. P. & Pl., 126; Griswold v. Sedgwick, 6 Cowen, 465; Scott v. Ely, 4 Wen., 555; Mead v. Haws, 7 Cowen, 332; Shadgett v. Clipson, 8 East, 328; Gurnsey v. Lovell, 9 Wen., 319; Scheer v. Keown, 29 Wis., 586.

³ Id.; Melvin v. Fisher, 8 N. H., 406; Scheer v. Keown, 29 Wis., 586.

⁴ R. S., 401, § 350.

⁵ Rex v. Hood, 1 M. & M., 281; 1 Arch. C. P. & Pl., 127.

⁶ 1 Arch. C. P. & Pl., 126; Wells v. Jackson, 3 Munf., 458.

duced the complaint to writing and caused it to be subscribed and sworn to by the said complainant, whereby it appears that the offense of (*insert the name of the offense, or so that it can be clearly inferred*) has been committed, and that C. D. is charged with having committed the same;

We therefore command you forthwith to take the person of the said C. D. and bring him before L. M., or, in case of his absence or inability to act, before any other judge or justice of the said county, to answer to the said charge and be dealt with according to law.¹

And you are also hereby required to summon (*insert names of witnesses*) to appear forthwith and give evidence on the examination of the said C. D. on the said charge, at my office in the town of — in said county.

Given under my hand and seal at — in the county of — and state of Illinois, this — day of —, A. D. 18—.

L. M., J. P. [SEAL.]

§ 50. *Special Officer.* — “The judge or justice of the peace issuing the warrant may make an order thereon authorizing a person to be named in the order to execute the same, and the person so named may execute such warrant in the same manner and have the like powers as if he were the officer named in the warrant, and all sheriffs, coroners, constables and others, when required in their respective counties, shall aid in the execution of such warrant.”²

FORM OF A WARRANT DIRECTED TO A PRIVATE PERSON.

State of Illinois, }
— County. } ss.

The People of the State of Illinois to all Sheriffs, Coroners and Constables of the said State, and to John Doe (*conclude as in the next previous form*).

FORM OF ORDER THEREON.

State of Illinois, }
— County. } ss.

Ordered that John Doe, named in the within warrant, be hereby authorized to execute the same.

Dated this — day of —, A. D. 18—.

L. M., J. P. [SEAL.]

¹ The warrant is sufficient although it does not command the officer to make a return of the same and his doings thereon. *Com. v. Boon*, 2 Gray, 74; *Tubbs v. Turhey*, 3 Cush., 438. And it has been held that it is not void, though returnable on the next day after its date. *State v. Freeman*, 8 Iowa, 429.

² R. S., 401, § 351. At common law a justice of the peace had a right to direct this warrant to any particular private person by name. *Com. v. Keeper of Prison*, 1 Ashm., 183; *Kelsey v. Parmelee*, 15 Conn., 260; *Meek v. Pierce*, 19 Wis., 300.

III. THE ARREST.

1. UNDER A WARRANT.

§ 51. **Who may Make the Arrest.** — In this state the statute requires the warrant to be directed to all sheriffs, coroners and constables in the state,¹ and by statute the magistrate issuing the warrant may authorize any person to execute the same,² and the statute authorizes any of these persons to arrest the person against whom the warrant is issued in any county in the state, whether in or out of his own county.³ A deputy sheriff who is duly appointed by an instrument in writing signed by the sheriff and qualified, may execute the warrant in the name of the sheriff.⁴ If the warrant is directed to a constable and not to a marshal, the acts of a marshal under it are void.⁵ Though the warrant is directed to several, it may be executed by one.⁶

§ 52. **Duty of the Officer on Receiving a Warrant.** — It is the duty of every officer to whom a warrant is lawfully directed and delivered, to serve and execute the same without delay,⁷ though he may do so at any time afterwards until the object of the warrant has been satisfied,⁸ and if he refuses or neglects to do so, he will be punishable for his disobedience and neglect.⁹ The officer should proceed with secrecy in all cases,¹⁰ and where the offense is not a felony at common law¹¹ he should be careful not to arrest a person not named or describ-

¹ R. S., 401, § 349.

² Id., § 351.

³ Id., §§ 351, 352.

⁴ Id., 990, §§ 7-12. As to rule under former statutes, see *Kindred v. Stitt*, 51 Ills., 401.

⁵ *Hickey v. Forrestal*, 49 Ills., 256.

⁶ 1 Bish. Cr. P., § 206.

⁷ R. S., 400, § 340.

⁸ 1 Bish. Cr. P., § 206; Peak, 234.

⁹ R. S., 383, § 208; 1 Chitty Cr. L., 47.

¹⁰ 1 Bish. Cr. P., § 206.

¹¹ *People v. Adler*, 3 Park., 254; *Marsh v. Smith*, 49 Ills., 396; *Kindred v. Stitt*, 51 Ills., 401.

ed in the warrant, for if he does so he will be a trespasser, though he actually arrests the proper person.¹ If the officer does not know the party, he should be informed, so as to be acquainted with his personal appearance, or have some one on whom he can rely point him out, as he is bound at his peril to arrest the proper person.²

§ 53. **Persons Privileged from Arrest.** — State senators and representatives are privileged from arrest in all cases except treason, felony, or a breach of the peace, during the session of the general assembly, and in going to and returning from the same.³ So are United States senators and representatives privileged from arrest in all cases except treason, felony and breach of the peace during their attendance at the session of their respective houses, and in going to and returning from the same.⁴ Foreign sovereigns, their attendants,⁵ ambassadors, diplomatic agents, their secretaries, attendants, families and domestic servants,⁶ public ministers, including secretaries of legation,⁷ while personally upon our territory, are privileged from arrest.⁸ But a consul is not privileged from arrest,⁹ though he cannot be proceeded against in a state court.¹⁰ Electors are privileged from arrest in all cases except for treason, felony or a breach of the peace during their attendance at

¹ Crock. on S. and C., §§ 55, 61; *ante* § 49.

² *Id.*; Barb. Cr. L., 532.

³ R. S., 63, Con. of Ills., Art. IV., § 14; 1 Pin. Wis., 115.

⁴ R. S., 11, Con. of U. S., Art. I., § 6, Sub. 1; 1 Pin. Wis., 84.

⁵ Phillim. International Law, 364; Polson Law of Nations, 25; Wheat. International Law, 6th Ed., 143.

⁶ *U. S. v. Lafontaine*, 4 Cranch C. C., 173; Vattel Law of Nations, b. 4, §§ 80-82; 1 Kent Com., 38, 39; Wheat. International Law, 6th Ed., 143, 284; *State v. De La Forest*, 2 Nott & McCord, 217; *Republica v. De Lonchampes*, 1 Dallas, 111; *Schooner Exchange v. McFadden*, 7 Cranch, 116; U. S. Stat. at Large, 117, Act of April 30, 1789, Chap. 9, § 25.

⁷ Vattel Law of Nations, b. 4, § 112; *ex parte Cabrera*, 1 Wash. C. C., 232; *Taylor v. Best*, 14 C. & B., 487; S. C., 25 Eng. L. & Eq., 383.

⁸ 1 Bish. Cr. L., §§ 124-128.

⁹ *U. S. v. Bavaria*, 2 Dallas, 297; *State v. De Laret*, 2 Nott & McCord, 217; *Com. v. Kosloff*, 5 Serg. & R., 545.

¹⁰ Judiciary Act of U. S., 1789; 1 Bish. Cr. L., § 181.

elections and in going to and returning from the same.¹ So the militia in all cases except treason, felony or breach of the peace are privileged from arrest during their attendance at musters, and elections, and in going to and returning from the same.² Judges, counselors, attorneys, clerks, sheriffs, and other officers of the court, shall be privileged from arrest while attending court and while going to and returning from court.³ It has been held in England that under the exception "treason, felony or the breach of the peace" all indictable offenses are comprehended.⁴

§ 54. **When Made.** — The arrest may be made at any time of the day or night, or on any day,⁵ including Sunday.⁶ But if made in the night more special notification of the officer's authority is necessary.⁷

§ 55. **Breaking Doors.** — The outer doors or windows of the dwelling-house of the offender may be broken open in the day or night time to make an arrest on a criminal warrant in all cases, for though in regard to civil process a man's house is his castle, it is not to be made a sanctuary for criminals of any grade.⁸ But in all cases of a misdemeanor,⁹ and possibly of a felony,¹⁰ where the party does not know the object of the officer, there should be first a demand for admittance and a statement of the object of it before breaking open the doors or windows.¹¹ So an officer acting in good faith under a regular

¹ R. S., 74, Con. of Ills., Art. VII., § 3.

² Con. of Ills., Art. XII., § 4.

³ R. S., 170, § 9.

⁴ *Rawlins v. Ellis*, 16 Mees. & W., 172; 1 Bish. Cr. P., § 207.

⁵ R. S., 401, § 352; *State v. Smith*, 1 N. H., 346; *Bell v. Clapp*, 10 John., 263; *State v. Shaw*, 1 Root, 134; *State v. Brennan's Liquors*, 25 Conn., 278.

⁶ 1 Arch. C. P. & Pl., 111; 1 Bish. Cr. P., § 207; *Main v. McCarty*, 15 Ills., 441.

⁷ 1 Arch. C. P. & Pl., 111, 112.

⁸ *Id.*, 116; *Barb. Cr. L.*, 545; 1 Bish. Cr. P., § 200; *Bell v. Clapp*, 10 John., 263; *State v. Smith*, 1 N. H., 346; *Snydacker v. Brosse*, 51 Ills., 360.

⁹ 1 Bish. Cr. P., §§ 197, 202.

¹⁰ *Crock. on S. & C.*, § 63.

¹¹ 1 Chitty Cr. L., 52.

criminal warrant may break into the house of a third person to arrest the supposed offender, and if he does not find him there, or it turns out that the supposed offender is innocent, the officer will be protected.¹ When an officer has entered the door of a dwelling-house and the doors are locked upon him, he or his assistants may break them open to obtain his or their liberty.²

§ 56. *Showing or Stating Substance of Warrant.* — A regular and known officer, acting within his proper district, is not bound to exhibit his authority when he arrests an offender, though it be demanded.³ But a special deputy must do so, and if he refuses, the party may resist,⁴ and the warrant under such circumstances will be no protection against an action for an assault and battery and false imprisonment.⁵ A regular officer should, however, either before or at the moment of the arrest, make known in some form that he comes in his official capacity to make the arrest on the warrant or other process, and not in that of a mere wrong-doer, or otherwise he may be lawfully resisted.⁶ But the wearing the accustomed badge of office is a sufficient notice of the official capacity, even in the case of a fresh incumbent,⁷ and possibly, if he was elected by the people, that may be deemed a sufficient notice.⁸ If an officer is acting out of his own district, he must show his warrant on demand made.⁹ In all cases after the party has submitted to the arrest, the officer, if required, is bound to inform him of the substance of the war-

¹ Crock. on S. & C., § 63; 1 Bish. Cr. P., §§ 200, 204.

² Crock. on S. & C., § 64; 1 Bish. Cr. P., § 205.

³ 1 Bish. Cr., P., §§ 190-192; *Rex v. Woolner*, 1 Moody, 334; *Rex v. Gordon*, 1 East. P. C., 315, 352; *Arnold v. Stevens*, 10 Wen., 514; *Com. v. Cooley*, 6 Gray, 350.

⁴ Barb. Cr. L., 534; *Frost v. Thomas*, 24 Wen., 418.

⁵ Crock. on S. & C., § 65; *Frost v. Thomas*, 24 Wen., 418.

⁶ *Bellows v. Shannon*, 2 Hill, 91; *Kindred v. Stitt*, 51 Ills., 406.

⁷ *Yates v. People*, 32 N. Y., 509.

⁸ 1 Bish. Cr. P., § 190.

⁹ *State v. Kirby*, 2 Ired., 201; *State v. Curtis*, Hayw., 471; *Com. v. Field*, 13 Mass., 321.

rant.¹ But in no case is the officer bound to part with the possession of the warrant, for that is his justification. If the party arrested should get possession of the warrant and refuse to return it, the officer may use just so much force as is necessary to retake it, and no more.²

§ 57. Arrest, how Made. — In order to constitute an arrest the party arresting must either touch the other,³ or actually and physically restrain and control him,⁴ or the party arrested must submit himself by words or actions to be in custody,⁵ and the intent to apprehend the person arrested must be made known or be obvious from the circumstances.⁶ It is sufficient that the party arresting "touch the other with the end of his finger."⁷ So if a bailiff comes into a room and tells the defendant he arrests him, and locks the door, that is an arrest, for he is in custody of the officer.⁸ But mere words will not constitute an arrest.⁹ As if an officer notifies or requests the defendant to appear before a magistrate and he accordingly appears, without being taken into custody, this does not constitute an arrest.¹⁰ The arrest is usually made by

¹ *State v. Townsend*, 5 Harring. Del., 487, 488; *Keman v. State*, 11 Ind., 471; *Drennan v. People*, 10 Mich., 169; *Com. v. Field*, 13 Mass., 321; *Bellows v. Shannon*, 2 Hill, 92; see *State v. Garrett*, 1 Winston, No. 1, 144; *Kindred v. Stitt*, 51 Ills., 405.

² Barb. Cr. L., 524; 1 Bish. Cr. P., § 193; *Rex v. Milton*, *Moody & M.*, 107; 3 Car. & P., 31.

³ *Genner v. Sparks*, 6 Mod., 173.

⁴ *Williams v. Jones*, Cas. temp. Hardw., 298, 301; *Granger v. Hill*, 4 Bing. N. R., 212; 5 Scott, 561.

⁵ 1 Chitty Cr. L., 48; 1 Arch. C. P. & Pl., 112; *Emery v. Chelsey*, 18 N. H., 198; *Mowry v. Chase*, 10 Mass., 79, 85; *Russen v. Lucas*, 1 Car. & P., 153; *George v. Bradford*, 3 Car. & P., 464; *Berry v. Adamson*, 6 B. & Cres., 528.

⁶ 1 Bish. Cr. P., § 158; *Mackalley's case*, 9 Co., 65a; *Rex v. Davis*, 7 Car. & P., 785; *Rex v. Howarth*, 1 Moody, 207; *Rex v. Payne*, 1 Moody, 378.

⁷ 1 Bish. Cr. P., § 157.

⁸ 1 Arch. C. P. & Pl., 112; 1 Bish. Cr. P., § 157; *Williams v. Jones*, Cas. temp. Hardw., 298, 301.

⁹ 1 Chitty Cr. L., 48; 1 Bish. Cr. P., § 157.

¹⁰ Barb. Cr. L., 530; 1 Arch. C. P. & Pl., 112; *Huntington v. Blaisdell*, 2 N. H., 318.

laying hands on the party and detaining him,¹ and according to some authorities the officer must corporally seize or touch the defendant's body before the arrest is complete;² but the better opinion seems to be that no manual touching of the body is necessary in order to constitute an arrest or an imprisonment. It is sufficient if the party is in the power of the officer and submits to the arrest.³

§ 58. **What Force may be Used.** — The person making the arrest should use no more force or constraint than is actually necessary to secure the arrest and safe custody of the accused.⁴ The degree will depend upon the circumstances of each case, as the character of the party charged and the magnitude of the crime.⁵ If an officer, in the execution of his office, in a criminal case, having legal process, be resisted and assaulted, he is justified if he kills the assailant; or if an officer or private person, while attempting to arrest a person charged with treason, murder, rape, burglary, robbery, arson, perjury, forgery, counterfeiting, or other felony, is resisted in the endeavor to take the person accused, he may kill him if necessary to prevent injury from such resistance and the consequent escape of the accused.⁶ According to the common law (and we think it is not changed by our statute,⁷ though it may be), if a person charged with a felony does not resist the officer attempting to arrest him, but runs, and the officer calls on him to stop, then, if he does not stop, the officer is justified in killing him, provided it is necessary to prevent his escape; but if the offense is a misdemeanor, the offi-

¹ 1 Arch. C. P. & Pl., 112.

² 1 Nun. & Walsh, 203; *Snydaker v. Brosse*, 51 Ills., 359; *Lawson v. Buzines*, 3 Harring., 416.

³ *Russen v. Lucas*, 1 Car. & P., 153; *Moody & Ry.*, 26; *George v. Bradford*, 3 Car. & P., 464; *Moody & M.*, 244; *Berry v. Adamson*, 6 B. & Cres., 528; 2 Car. & P., 503; *Collins v. Sung*, 6 Moore, 111; *Gold v. Bissell*, 1 Wen., 215; 18 N. H., 198.

⁴ *State v. Mahon*, 3 Harring., 568; 1 Nun. & Walsh, 203.

⁵ Barb. Cr. L., 531; *Crock. on S. & C.*, § 67.

⁶ R. S., 375, § 150.

⁷ Id.

cer has no right in such case to take this extreme measure.¹ An officer should not kill an offender instead of arresting him, even though he is in the act of committing a felony.²

§ 59. Assistance. — The statute provides that "every male person above the age of eighteen, when commanded by an officer to assist in arresting or securing an offender, shall obey such command."³ Where an officer commands the assistance of others, it has been held that he must be present, or at least so near as to appear to be acting in the arrest.⁴ But where the sheriff commanded A and certain other persons, at the house where the offenders then were, to watch them and prevent their escape while he went about four miles to procure sufficient force to complete the arrest, it was held that the sheriff was constructively present so as to justify A and others in arresting the offenders during his temporary absence.⁵ Where an officer at the commission of an offense is not able to make the arrest, and calls in other officers or the posse, those who aid have a justification as broad as his own.⁶ There is authority for saying that one who is called upon to assist an officer in making an arrest under a warrant, and who acts in good faith, is justified though the process is not valid to the extent of justifying the officer himself.⁷ But the better opinion is that if the officer does not act under lawful authority, any person assisting him by his command will not

¹ 1 Bish. Cr. P., § 159; 1 Arch. C. P. & Pl., 117, 118; *Reg. v. Dodson*, 2 Den. C. C., 35; *State v. Roane*, 2 Dev., 58; *Dill v. State*, 25 Ala., 15; *Brady v. Price*, 19 Texas, 285.

² *Reg. v. Murphy*, 1 Crawf. & Dix. C. C., 20; *Gardiner v. Thibodeau*, 14 La. An., 732.

³ R. S., 400, § 3; see *post* § 62.

⁴ 1 Chitty Cr. L., 49; *Rex v. Patience*, 7 Car. & P., 775; *People v. Moore*, 2 Doug. Mich., 1.

⁵ *Coyles v. Hurin*, 10 John., 85; *Com. v. Field*, 13 Mass., 321; *Fenton's case*, Loft, 27.

⁶ *Main v. McCarty*, 15 Ills., 441; *Paige v. De Puy*, 40 Ills., 506; *Payne v. Green*, 10 S. & M., 507.

⁷ 1 Bish. Cr. P., 187; *Reed v. Rice*, 2 J. J. Mar., 44.

be protected.¹ A person obstructing² or encouraging others to resist the execution of process may be arrested.³

§ 60. Where Accused is Already in Custody. — It sometimes happens that the party against whom the warrant is issued on a criminal charge is already in jail on process issued in a civil or criminal suit. While the prisoner is in the custody of the law he cannot be re-arrested and taken out of the custody of the officer making the arrest, or of the jailor having him in charge upon other process, whether civil or criminal, except upon a *habeas corpus* duly granted.⁴ In England where the party is in custody on a civil prosecution, the criminal warrant is lodged with the keeper of the place of confinement in which the defendant is imprisoned. This officer, on the termination of the civil imprisonment, sends for the officer, who takes the party before the justice, and then the same proceedings are had as in ordinary cases. When a party is already in jail on a criminal charge, and fully committed for trial, the justice hears the complaint, etc., as in other cases, and a warrant of detainer is sent to the jail in whose custody he remains.⁵ It would seem, however, to be most consistent with our statute when the accused is confined on criminal process, to lodge the warrant with the jailer and let him see to the service of it in the same way as is above provided with respect to a party in custody on a civil process.⁶

¹ *Elder v. Morrison*, 10 Wen., 128; *Oystead v. Shed*, 12 Mass., 511; 13 Mass., 321; *Vinton v. Weaver*, 41 Me., 430; *Mitchell v. State*, 7 Engl., 50; *Wolf v. Boettcher*, 64 Ills., 317.

² *Levy v. Edwards*, 1 Car. & P., 40; *Anonymous*, 1 East P. C., 305; *Coyles v. Hurin*, 10 John., 85; *McMahan v. Green*, 34 Vt., 69.

³ *White v. Edmunds*, Peake, 89.

⁴ *Williams v. Bacon*, 10 Wen., 636; *Brown v. Tracy*, 9 How. N. Y. Pr. R., 93.

⁵ 1 Chitty Cr. L., 63, 64; Crock. on S. & C., § 68.

⁶ Barb. Cr. L., 536.

2. WITHOUT WARRANT.

§ 61. Arrest when Offense is Committed in the Presence of the Magistrate — Complaint. — The statute provides that “a magistrate may orally order an officer or a private person to arrest any one committing or attempting to commit a criminal offense in the presence of such magistrate.”¹ If a breach of the peace is committed in the presence of the magistrate,² or if an offense is committed in the court of a magistrate in his presence, he may verbally authorize the attending officer to take the offender into custody, no warrant being necessary in the first instance;³ and in such case the magistrate may proceed to the trial of the offender, and enter judgment against him without issuing a warrant of arrest.⁴ But a written complaint or information against the party, setting out his offense, is as necessary in such case as in any other.⁵ If the offense is committed in the absence of the magistrate he must issue a warrant in due course of law to apprehend the offender.⁶

§ 62. Arrests without Warrant. — An arrest may be made by an officer or by a private person, without warrant, for a criminal offense committed or attempted in his presence, whether a felony or misdemeanor;⁷ and by an officer when a criminal offense which was a felony at common law has in fact been committed, and he has reasonable grounds for believing the person to be arrested committed it.⁸ Formerly in such case

¹ R. S., 400, § 5; *Kindred v. Stitt*, 51 Ills., 406.

² *Com. v. McGahcy*, 11 Gray, 194.

³ *Lancaster v. Lane*, 19 Ills., 242; *O'Brian v. State*, 12 Ind., 369; *Holcomb v. Cornish*, 8 Conn., 375.

⁴ *Tracy v. Williams*, 4 Conn., 107; *Hogart v. Bigley*, 6 Humph., 236.

⁵ 1 Bish. Cr. P., § 179; *Tracy v. Williams*, 4 Conn., 107; R. S., 400, § 340; *Id.*, 401, § 348.

⁶ 1 *Kindred v. Stitt*, 51 Ills., 406.

⁷ R. S., 400, § 4; *Phillips v. Trull*, 11 John., 486; *Keenan v. State*, 8 Wis., 132; *Long v. State*, 12 Ga., 293; *Rex v. Hunt*, 1 Moody, 93; *Hancock v. Baker*, 2 B. & P., 260; *Rueck v. McGregor*, 3 Vroom, 70; *Keenan v. State*, 18 Wis., 132; *People v. Adler*, 3 Park., C. R., 254; *Miles v. Weston*, 60 Ills., 362.

⁸ R. S., 400, § 342; 1 Arch. C. P. & Pl., 101; *Dodd v. Board*, 43 Ills., 95; *Kindred v. Stitt*, 51 Ills., 406; *Mayo v. Wilson*, 1 N. H., 53; *Holly v. Mix*, 3 Wen., 350; *Marsh v. Smith*, 49 Ills., 396.

a private person could also make the arrest;¹ but under the present statute it seems to be the intention to change the law so as to prohibit private persons from making arrests unless commanded by a sheriff, coroner or constable,² except in the cases where the offense is committed in their presence. At common law an arrest for a misdemeanor could only be made upon a warrant,³ unless the offense was committed in the presence of the officer or private person making the arrest,⁴ and then such officer or private person could not arrest the offender if he did not make the arrest at the time the offense was committed, or attempt to make it then and continue the attempt until the arrest was completed;⁵ but according to a recent statute, when an offense has been committed, whether a felony or misdemeanor, an officer may, if he has reasonable grounds for believing that a particular person committed such offense, arrest him without a warrant;⁶ yet, so far as the statute relates to misdemeanors and authorizes an arrest without a warrant, where an arrest was not allowed without a warrant at common law, the courts may hold it to be unconstitutional and void, as conflicting with the spirit and intent of the constitution of this state, which provides in substance that "the right of the people to be secure in their persons," etc., "shall not be violated; and no warrant shall issue without probable cause, supported by affidavit,"⁷ etc.; for this provision will not afford much protection or security to the people in their persons if the legislature can authorize a constable to make arrests, when a magistrate is prohibited by it from issuing his warrant for that purpose unless supported by the proper

¹ *People v. Adler*, 3 Park., 254; *Kindred v. Stitt*, 51 Ills., 401; *Dodds v. Board*, 43 Ills., 95.

² R. S., 400, § 339.

³ *People v. Adler*, 3 Park., 254; *Fox v. Gaunt*, 3 B. & Ald., 798; *Com. v. Carey*, 12 Cush., 246; *Com. v. McLaughlin*, 12 Cush., 615.

⁴ 1 Bish. Cr. P., §§ 169, 170, 183, 184; *Phillips v. Trull*, 11 John., 486.

⁵ *Phillips v. Trull*, 11 John., 486; *Main v. McCartney*, 15 Ills., 441; *Taylor v. Strong*, 3 Wen., 384; *Reg. v. Walker*, 25 Eng. L. & Eq., 589; *Reg. v. Marsden*, Law R., 1 C. C., 131.

⁶ R. S., 400, § 342.

⁷ R. S., 59, Con. of Ills., Art. II., § 6.

affidavit. If an attempt is made to arrest an offender at the time the offense is committed, the officer or person attempting to make the arrest may pursue the offender and make the arrest without a warrant in a reasonable time after the commission of the offense.¹ Therefore it has been held that a policeman of a city had authority to arrest without a warrant for breaches of certain city ordinances committed in his presence.² And that the arrest was not unlawful if not made immediately, especially if not made on account of the resistance of the offender making assistance necessary, or the arrest was evaded by other arts and means for gaining time.³ Under the statute the officer cannot justify the arrest of a supposed offender on suspicion of his guilt unless he can show that a criminal offense has been committed by some person as well as that he had reasonable grounds for believing that the person arrested committed such offense; for the officer acts at his peril if he acts without a warrant, and if it turns out that no offense was committed, he will be liable.⁴

4. PROCEEDINGS AFTER THE ARREST.

§ 63. *Duty of the Person Making the Arrest.* — When an arrest is made, either with⁵ or without⁶ a warrant, by an officer or a private person, it is the duty of the person making the arrest to take the person arrested "before the judge or justice who issued the warrant, or in his absence before some other judge or justice of the peace of the county in which the warrant was issued," according to the import of the warrant, if the arrest was made by warrant;⁷ if the arrest was

¹ *Holly v. Mix*, 3 Wen., 350; 1 Arch. C. P. & Pl., 101.

² *Bryant v. Bates*, 15 Ills., 87; *Main v. McCartney*, 15 Ills., 441.

³ *Main v. McCartney*, 15 Ills., 441.

⁴ 1 Arch. C. P. & Pl., 102, n. 1; R. S., 400, § 342; *Dodds v. Board*, 43 Ills., 95; *Kindred v. Stitt*, 51 Ills., 401. The rule was formerly supposed to be otherwise. 1 Bish. Cr. P., § 181.

⁵ R. S., 402, §§ 353, 355; 1 Chitty Cr. L., 59.

⁶ R. S., 400, § 342; Bish. Cr. P., § 213.

⁷ R. S., 402, §§ 353, 355; *People v. Fuller*, 17 Wen., 211; *Batchelder v. Currier*, 45 N. H., 460.

without warrant, then "before the nearest magistrate in the county,"¹—and he will be liable if he be guilty of unnecessary delay.² But if the time be unseasonable, as in or near the night, whereby he cannot attend the magistrate, or the party be ill and unable at present to be brought, he may, as the case shall require, secure him in a house or some other safe place till the next day, or until it may be reasonable to bring him.³ It has been held under the New York statute that a person may be detained twelve hours to find a magistrate before whom he may be examined;⁴ but it has also been held that a delay of three days in taking a prisoner before a magistrate was not justifiable.⁵

§ 64. *Passing through other Counties.* — "The officer, or any person so authorized, having the custody of a prisoner, may pass through any counties which may be in his route, between the place of arrest and the place to which he is taking the prisoner, and may lodge the prisoner in any jail on the route for safe custody for one night or more, as circumstances may require."⁶

§ 65. *Prisoner, how Treated — Re-arrest.* — One having the custody of a prisoner should treat him kindly; but in all cases if the prisoner uses violence to effect his escape, he may use so much force as is necessary to prevent it, even if he is obliged to kill the prisoner to prevent his escape;⁷ yet where a party charged only with a misdemeanor effects his escape without violence, and merely flies to avoid being re-taken, if the person having him in custody kill him in the pursuit, he will be guilty of murder, or, if death was not intended, manslaughter.⁸ An officer having a prisoner in custody may tie

¹ R. S., 402, § 353.

² Foster, 143; 2 Hale P. C., 119; 1 Arch. C. P. & Pl., 133, n. o; Pratt v. Hill, 16 Barb., 303.

³ 2 Hale P. C., 95, 96, 119, 120; 1 Chitty Cr. L., 59; 1 Bish. Cr. P., § 216.

⁴ Arnold v. Steives, 10 Wen., 515.

⁵ Wright v. Court, 6 D. & Ry., 623, 4 B. & Cres., 596.

⁶ R. S., 402; § 354.

⁷ 1 Bish. Cr. P., § 163; 1 Chitty Cr. L., 62.

⁸ 1 Chitty Cr. L., 62; Barb. Cr. L., 539.

him¹ or put hand-cuffs² on him if it is necessary to prevent his escape; and it is laid down that where the officer acts honestly and from pure motives he is to be himself the sole judge of the necessity of such a measure as this.³ If the prisoner escapes,⁴ or the officer allows him to go at large,⁵ he may be arrested again on the same warrant.

5. THE RETURN.

§ 66. *Return, how Made.* — The statute requires the warrant, with a proper return thereon signed by the person making the arrest, to be delivered to the magistrate before whom the prisoner is brought.⁶ It has been held in Massachusetts that where an officer justified under a warrant he must show that he returned it, otherwise he was a trespasser;⁷ and, in New York, that when the magistrate issuing the warrant was absent, and the accused was taken before another, the officer making the arrest should in his return state such absence or it must be proved by a witness.⁸

FORM OF A RETURN TO A WARRANT.

State of Illinois, }
 ——— County. } ss.

In obedience to the within writ I have arrested C. D., the defendant therein named, and have him now in custody here in court to answer as I am within commanded (or, "*I have arrested C. D., one of the defendants therein named, and have him now in custody here in court to answer, as I am within commanded. E. F. and G. H., the other defendants, not found*").

Dated this — day of —, A. D. 18—.

J. S., Const. of — Co., Ills.

¹ 1 Bish. Cr. P., § 163.

² Id., § 214.

³ Id., § 163; *State v. Stalcup*, 2 Ired., 50.

⁴ *Cooper v. Adams*, 2 Blackf., 294; *Com. v. Sheriff*, 1 Grant Pa., 187.

⁵ *Com. v. Sheriff*, 1 Grant Pa., 187; *Clark v. Cleveland*, 6 Hill, 344.

⁶ R. S., 402, § 355.

⁷ *Tubbs v. Tukey*, 3 Cush., 438.

⁸ *People v. Fuller*, 17 Wen., 211.

IV. THE EXAMINATION.

§ 67. **Provisions of the Statute Relating to the Examination.** — The statute provides that “the judge or justice before whom any person charged with a criminal offense is brought, with or without a warrant, shall, as soon as may be, examine the witnesses in support of the prosecution, as well as those who may be produced on behalf of the accused, on oath in the presence of the party charged, in relation to any matters connected with such charge which he may deem pertinent.”¹

§ 68. **Time of Examination.** — It is the duty of the magistrate to take and complete the examination of the accused as soon as the nature of the case will admit; but he is allowed a reasonable time for this before he makes his final decision. A commitment for further examination must not be made use of as a commitment for trial; and the examination must take place in a reasonable time, otherwise an action will lie against the magistrate,² even though he acts without any improper motive.³ And it appears that a warrant for a commitment for an unreasonable time is wholly void.⁴

§ 69. **Continued — What a Reasonable Time.** — As to what is a reasonable time for the full investigation of the case in such cases, is a question which depends upon the circumstances of each case.⁵ Fifteen days were held to be an unreasonable time unless there were circumstances to account for it, and those circumstances it was incumbent on the magistrate to show.⁶ Where the plaintiff got drunk on Sunday night, and was locked up until Monday noon by a constable, and then brought out by him, and, on meeting a magistrate in the street, he said to him, “Take him back: I will see him to morrow,” and he was taken back and brought out the next

¹ R. S., 402, § 360.

² Id.; 1 Chitty Cr. L., 72, 73, 74; *Pratt v. Hill*, 16 Barb., 303.

³ *Davis v. Capper*, 10 B. & Cres., 28; S. C., 5 M. & Ry., 53.

⁴ Id.

⁵ 1 Chitty Cr. L., 74.

⁶ *Davis v. Capper*, 4 Car. & P., 134; see *Potter v. Kingsbury*, 4 Day, 97; *Com. v. Ross*, 6 Serg. & R., 427.

day, the magistrate was held to be liable for false imprisonment.¹ Where the plaintiff was in the presence of the justice when the latter ordered the defendant, a constable, to take him into custody until the next day, which he did, the constable was held liable.² Where a justice of the peace issued a warrant for the arrest of an individual upon a criminal charge, late on Saturday night, with an indorsement thereon directing the accused should be committed until the following Monday for examination, and the constable arrested the accused on the same evening, and committed him to jail without first bringing him before the justice, it was held that the justice had exceeded his authority, and that he, together with the constable and his assistants, were liable in trespass.³

§ 70. *Adjournment.* — The statute, however, provides that “a judge or a justice of the peace may, for good cause appearing, adjourn an examination or trial pending before himself, from time to time, as occasion requires, not exceeding ten days at one time, without the consent of the defendant or person charged. In the mean time, if the party is charged with an offense not bailable, he shall be committed; otherwise he may be recognized in a sum and with sureties to the satisfaction of such judge or justice of the peace for his appearance for such further examination, and for want of such recognizance he shall be committed to jail.”⁴

¹ *Edwards v. Ferris*, 7 Car. & P., 542; *Pratt v. Hill*, 16 Barb., 308.

² *Boughton v. Mulshoe*, Moor, 408, S. C., Vin., 482.

³ *Pratt v. Hill*, 16 Barb., 303.

⁴ R. S., 402, § 356. This statute has been held to apply to cases of *hasty*. *People v. Green*, 58 Ills., 236. Where a party is arrested for an alleged violation of a town ordinance, the police magistrate before whom the proceeding is pending has no power to exact a bond from the defendant for his appearance on granting him a continuance, and a bond given in such case is void. *Maguire v. Town of Xenia*, 54 Ills., 299. A magistrate has no authority to order a person accused of a criminal offense to be committed until a subsequent day for examination without the accused being brought before him. *Pratt v. Hill*, 16 Barb., 303.

FORM OF RECOGNIZANCE ON ADJOURNMENT.¹

State of Illinois, }
 _____ County. } ss.

Be it remembered that on the — day of —, A. D. 18—, C. D., of the town of — in the said county, and E. F. and G. H., of the town of — in the county aforesaid, personally came before L. M., a justice of the peace of said county, and severally and respectively acknowledged themselves to owe and be indebted unto the People of the State of Illinois,—that is to say, the said C. D., in the sum of five hundred dollars, and the said E. F. and G. H. each the sum of five hundred dollars, to be made and levied of their respective goods and chattels, lands and tenements, to the use of the said people if default shall be made in the following condition:

Whereas, A. B. lately made a complaint to L. M., a justice of the peace of the said county, and the said justice examined on oath the said complainant and E. F., a witness produced by him, and reduced the complaint to writing and caused it to be subscribed and sworn to by the said complainant, whereby it was charged that the said C. D. did (*insert statement of the offense as in the complaint*), and the said C. D. has been arrested and brought before the said justice to answer to the said charge; and whereas the (*further*) examination of the said C. D. on the said charge is adjourned until the — day of —, A. D. 18—, at 10 o'clock A. M., before the said justice, at his office in the town of — in said county,—

Now therefore the condition of this recognizance is such that if the said C. D. shall be and personally appear before the said justice at his said office on the said day and hour last above mentioned, and not depart without leave, but abide the order of the court, then this recognizance shall be void—otherwise to remain in full force and virtue.

C. D. [SEAL.]

E. F. [SEAL.]

G. H. [SEAL.]

Taken, subscribed and acknowledged }
 before, and approved by, me on the day }
 and year first above written.

L. M., J. P.

§ 71. Default for not Appearing as Required by the Recognizance. — “If the person so recognized does not appear before the judge or justice of the peace according to the condition of such recognizance, the judge or justice of the peace shall record the default, but such default may be set aside by the judge or justice for good cause shown, on the appearance of the accused at any time to which the matter may be continued by such judge or justice of the peace. And in case such default is not set aside as aforesaid, the judge or

¹ For another form, see *Ogden v. People*, 62 Ills., 64.

justice shall certify the recognizance with a record of the default to the court having cognizance of the offense, and like proceedings may be had thereupon as upon the breach of the condition of a recognizance for appearance before such court, or an action of debt may be maintained thereon."¹

FORM OF RECORD OF DEFAULT AND CERTIFICATE.

State of Illinois, }
 ———, County. } ss.

Be it remembered that on this the — day of —, A. D. 18—, at — o'clock A. M., C. D. on being called,² failed to appear at my office in the town of —, according to the condition of the recognizance made and executed by him, E. F. and G. H., taken and acknowledged before and approved by me, on the — day of —, A. D. 18—.

It is therefore considered and adjudged that the said C. D. is in default, and the said recognizance is hereby declared forfeited.

L. M., J. P.

State of Illinois, }
 ———, County. } ss.

I the undersigned, a justice of the peace of said county, do hereby certify that the annexed (*or "foregoing"*) recognizance was taken, subscribed and acknowledged before and approved by me on the — day of —, A. D. 18—; and that the foregoing is a record of the default of C. D. on the said recognizance.

Given under my hand this — day of —, A. D. 18—.

L. M., J. P.

§ 72. *Failing to Recognize on Adjournment.* — "When a person fails to recognize, he may be committed to jail by an order of the judge or justice of the peace, which order shall be in writing, and contain a concise statement of the reason of such commitment and the day and place appointed for his examination, and on the day appointed he may be brought before the judge or justice, by his verbal order to the officer who made

¹ R. S., 402; § 357; *People v. Green*, 58 Ills., 236. If the defendant appears at the time and place fixed in the recognizance, and the examination is continued without a new recognizance being given, the justice has no right to enter his default for not appearing on the day to which the examination is continued, for by appearing on the day fixed in the recognizance the defendant fully complies with its condition. *Ogden v. People*, 62 Ills., 64.

² A default cannot properly be entered against the defendant until he is called. *State v. Gorley*, 2 Iowa, 52.

the commitment, or by an order in writing to a different person.”¹

FORM OF COMMITMENT ON ADJOURNMENT.

State of Illinois, }
 ———, County. } ss.

The People of the State of Illinois to the Sheriff, Coroner or Constable of said County, Greeting:

Whereas, A. B. lately made complaint to L. M., a justice of the peace of said county, and the said justice examined on oath the said complainant and E. F., a witness produced by him, and reduced the complaint to writing, and caused it to be subscribed and sworn to by the said complainant, whereby it was charged that C. D. did (*insert the statement of the offense as in the complaint*), and it appearing from the said complaint and examination that the said offense had been committed, and that the said C. D., was charged with having committed the same, the said justice thereupon issued a warrant for the arrest of the said C. D., and the said C. D., has since been arrested thereon, and brought before the said justice to answer to said charge; and whereas the (*further*) examination of the said C. D. on said charge is adjourned until the — day of —, A. D. 18—, at 10 o'clock A. M., before the said justice, at his office in the town of — in said county, and the said C. D. having failed to enter into a recognizance with good and sufficient surety or sureties for his personal appearance before me at that time and place,—

We therefore command you the said constable to convey the said C. D. to the common jail of said county and deliver him to the keeper thereof together with this warrant; and you the said keeper are hereby required to receive and safely keep the said C. D. in your custody in said jail until the time last above mentioned, when you are hereby required to deliver him to such person as the said justice shall order.

Given under my hand and seal this — day of —, A. D. 18—.

L. M., J. P. [SEAL].

FORM OF ORDER TO BRING ACCUSED BEFORE THE MAGISTRATE AT THE TIME TO WHICH THE EXAMINATION WAS ADJOURNED.

State of Illinois, }
 ——— County. } ss.

The People of the State of Illinois to I. J., a Constable of said County, and the Keeper of the Common Jail of said County, Greeting:

Whereas, C. D. is now in the common jail of the said county, charged with (*insert the name of the offense, as in the warrant*) for failing to give a recognizance to appear before L. M., a justice of the peace of said county, at his office in the town of — in said county, on the — day of —, A. D. 18—, at 10 o'clock A. M., to answer to said charge,—

You, the said keeper, are hereby commanded to deliver the said C. D.

¹ R. S., 402, § 358.

into the custody of the said I. J., and you the said I. J. are commanded to bring him before the said justice at the time and place last above mentioned.

Given under my hand and seal this — day of —, A. D. 18—

L. M., J. P. [SEAL.]

§ 73. **The Witnesses.** — The magistrate, having authority to examine as to the probability of the guilt or innocence of the accused,¹ as an incident to his authority has power to bring before him all persons who appear to be material for the prosecution or the defense; and for this purpose he may issue his subpoena, which may be in the usual form. But the justice can only compel the attendance of witnesses within the limits of his own jurisdiction.² If the witness, upon the service of the subpoena, refuses or neglects to attend in pursuance of it, the magistrate may, upon proof of the service of it, issue an attachment against him.³ Yet the attachment must be confined to the simple purpose of directing the constable to bring the refractory witness before the justice in order to give testimony; and, therefore, where it commanded that the witness should be brought up to find sufficient bail to appear and give evidence, it was held that the justice had exceeded his powers and that the warrant was bad.⁴ In a criminal case a witness cannot decline to be sworn though he has not been subpoenaed at all.⁵ When a witness refuses to be sworn and to testify in answer to lawful questions, the magistrate may commit him to jail. He is committed "until he consents to testify," or "until he shall submit to be examined touching the said offense."⁶ Since the statute requires the examination of the witnesses to be in the presence of the accused and by the justice before whom the accused is brought,⁷

¹ R. S., 402, §§ 360, 361; Id., 403, § 363.

² 1 Chitty Cr. L., 76; 1 Arch. C. P. & Pl., 155; Roscoe Cr. Ev., 123; *Son v. People*, 12 Wen., 344; U. S., *v. Moore*, J. B. Wallace R., 23.

³ Id.

⁴ 1 Arch. C. P. & Pl., 157; 12 Al. & El., 55, 4 Perry & D., 32.

⁵ 1 Arch. C. P. & Pl., 157; 4 Car. & P., 218.

⁶ 1 Arch. C. P. & Pl., 158.

⁷ R. S., 402, § 360.

the deposition of witnesses cannot be taken though they are out of the county or state.¹

§ 74. **Separation of Witnesses.** — “While a witness is being examined, the judge or justice of the peace may, if he sees cause, exclude from the place of examination all other witnesses, or direct the witnesses to be kept separate, so they cannot converse with each other, until they have been examined.”²

§ 75. **Competency of Witnesses.** — The statute provides that “no person shall be disqualified as a witness in any criminal case or proceeding by reason of his interest in the event of the same, as a party or otherwise, or by reason of his having been convicted of any crime; but such interest or conviction may be shown for the purpose of affecting his credibility: *Provided*, however, that a defendant in any criminal case or proceeding shall only at his own request be deemed a competent witness, and his neglect to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect.”³

§ 76. **Husband and Wife.** — Neither the husband nor wife can be a witness in a criminal case in which the other is a party,⁴ (except in the case of a personal injury committed by one upon the other, in which case from necessity the one may be a witness against the other⁵). The wife in such case is not permitted to testify, even with the husband's consent.⁶ According to some authorities the husband or wife cannot be a witness for a party joined with the other, even if they are tried separately,⁷ while according to others the husband or wife

¹ *People v. Restil*, 3 Hill, 289.

² R. S., 402, § 361.

³ *Id.*, 410, § 426.

⁴ *Miner v. People*, 58 Ills., 60; 1 Greenl. Ev., § 334; *U. S. v. Mills*, Burr., 183.

⁵ 1 Arch. C. P. & Pl., 496; *State v. Dudley*, 7 Wis., 664.

⁶ *People v. Randall*, 5 City Hall Rec., 141, 153, 154; *People v. Colburn*, 1 Wheeler Cr. C., 479; *Baxter v. Dixie*, Cas. temp. Hardw., 264; *Sedgwick v. Watkins*, Vesey, 49.

⁷ *People v. Bill*, 10 John., 95; *People v. Colburn*, 1 Wheeler Cr. C., 479; *Pullen v. People*, 1 Doug., 48.

can be a witness in such case,¹ though all the authorities agree that the husband or wife cannot be a witness for a party joined and tried jointly with the other.² The reason for the exclusion of the husband or wife in these cases was formerly founded upon the interest of the parties being the same, as well as on public policy.³ By recent statute permitting a person interested and a party to testify at his own request,⁴ the objection on the ground of interest is removed, but the objection on the ground of public policy remains untouched, and therefore the law remains unchanged by statute.⁵ In case of a criminal proceeding against the husband or wife the other is not permitted after a divorce to testify as to any transaction which took place prior to the divorce.⁶ On an indictment against the wife for adultery,⁷ or for living in an open state of adultery, the husband cannot be a witness to prove the marriage between them, though that fact is essential to be proved in order to convict her.⁸ In one case it was held that the wife could not be a witness though she married the defendant after she was subpœnaed in the cause.⁹ But the rule does not prohibit a kept mistress who has passed as the party's wife from testifying for him.¹⁰ Where several persons were jointly indicted, the wife of one of them was held to be a competent witness for the others after her husband had been acquitted.¹¹ So the wife is a competent witness against the husband on an indictment for a rape committed

¹ Bish. Cr. P. § 1019; *Com. v. Manson*, 2 Ashm., 31; *Com. v. Easland*, 1 Mass., 15; *Moffett v. State*, 2 Humph., 99; *State v. Worthing*, 31 Me., 62; *Thomp. v. Com.*, Met. Ky., 13; *State v. Drawdy*, 14 Rich., 87.

² 1 Bish. Cr. P., § 1019; 1 Arch. C. P. & Pl., 497; *Schoeffler v. State*, 3 Wis., 823.

³ 1 Greenl. Ev., § 254; *Schoeffler v. State*, 3 Wis., 824.

⁴ R. S., 410 § 360; *ante* § 75.

⁵ *Mitchinson v. Cross*, 58 Ills., 369; *contra*, *Lucas v. State*, 23 Conn., 18.

⁶ *Barnes v. Comack*, 1 Barb., 392; *Cook v. Grange*, 18 Ohio, 526; *Wadams v. Humphrey*, 22 Ills., 661; *Rea v. Tucker*, 51 Ills., 110.

⁷ *U. S. v. Mills*, Bur., 183.

⁸ *Miner v. People*, 58 Ills., 60; *U. S. v. Mills*, Bur., 183.

⁹ *Pedley v. Wellesby*, 3 Car. & P., 558.

¹⁰ *Bathews v. Gallindo*, 4 Bing., 610.

¹¹ *State v. Anthony*, 1 McCord, 285; *State v. Bradley*, 9 Richardson, 163; *Moffett v. State*, 2 Humph., 99; *State v. Worthing*, 31 Me., 62.

on her own person,¹ or for an assault and battery upon her,² or for maliciously shooting her.³

§ 77. **Approvers and Accomplices.** — Under a former statute an approver was not allowed to give testimony,⁴ but the statute is now repealed. An approver, as well as an accomplice, not jointly charged or made defendant, may be a witness, and it has been held that a legal conviction may be had upon the uncorroborated testimony of an accomplice.⁵

§ 78. **Infamous Persons.** — Formerly infamous persons were disqualified to be witnesses;⁶ but under the present statute no person is disqualified from being a witness in a criminal case by reason of his having been convicted of any crime; but such conviction may be shown for the purpose of affecting his credibility.⁷

§ 79. **Joint and Separate Examinations.** — Where several persons are jointly charged with an offense they cannot insist upon a separate examination as a matter of right, but the magistrate may in his discretion allow them to be examined separately, and should do so if upon considering all of the circumstances of the case it is his opinion that the ends of justice will be promoted thereby.⁸ If one of the defendants wishes to avail himself of the testimony of the wife of another one, he should apply for a separate examination; and as a general rule it will be granted him;⁹ for the better opinion seems to be that the wife in such case may be allowed to testify for or against any of the defendants examined separately

¹ *People v. Audley*, 3 Howell St. Tr., 402, 413.

² *Rex v. Lawley*, Bull. N. P., 287; *Rex v. Azire*, 1 Stra., 633; *Soule's Case*, 5 Greenl., 407; *State v. Davis*, 3 Brevard, 3.

³ 1 Greenl. Ev., § 343.

⁴ *Myers v. People*, 26 Ills., 173; *Gray v. People*, 26 Ills., 346-7.

⁵ *Gray v. People*, 26 Ills., 344; *Cross v. People*, 47 Ills., 153; *contra*, *Ray v. State*, 1 Greene Iowa, 316; *Johnson v. State*, 4 Greene Iowa, 65.

⁶ 1 Greenl. Ev., § 372.

⁷ R. S., 410, § 426.

⁸ 1 Arch. C. P. & Pl., 319; *Maton v. People*, 15 Ills., 536; *People v. Williams*, 19 Wen., 377; *State v. Conley*, 39 Me., 78; *People v. Stockham*, 1 Park., 424; *Johnson v. People*, 22 Ills., 317; *State v. Nash*, 7 Iowa, 348; *State v. Marvin*, 12 Iowa, 499.

⁹ *Com. v. Manson*, 2 Ashm., 31; *Com. v. Easland*, 1 Mass., 15.

from her husband,¹ unless the acquittal of such defendant would work the acquittal of her husband;² while if her husband is examined jointly with the other defendants she cannot be a witness for them.³ Even if separate examinations are granted, no one of the persons jointly charged can be a witness for any other one without being first acquitted or convicted,⁴ except on his own motion.⁵ But where there is not sufficient evidence, or there is no evidence, to criminate the accused, or if he is made defendant by mistake, or for the purpose of doing away with his testimony, it is the duty of the magistrate to discharge him, that he may be a witness for or against the other defendant or defendants jointly charged with him.⁶ If one defendant has been discharged,⁷ or has plead guilty and no sentence has been pronounced against him,⁸ he may be a witness for the rest. In case of a conspiracy,⁹ affray¹⁰ or riot,¹¹ no separate trials should be allowed unless there is a special reason for it.¹²

§ 80. **Amendments.** — The statute provides that “the prisoner shall not in any case be discharged on account of any insuffi-

¹ *Thomp. v. Com.*, 1 Met. Ky., 13; *State v. Drawdy*, 14 Rich., 87; *State v. Anthony*, 1 McCord, 285; *State v. Bradley*, 9 Rich., 168; *Moffett v. State*, 2 Humph., 99; *State v. Worthing*, 31 Me., 62.

² 1 Bish. Cr. P., § 1019.

³ *Com. v. Robinson*, 1 Gray, 555; *Rex v. Smith*, 1 Moody, 289; *Rex v. Locker*, 5 Esp., 107; *Com. v. Marsh*, 10 Pick., 57; *Robbins v. King*, 2 Leigh Com. R., 142.

⁴ 1 Arch. C. P. & Pl., 501; *People v. Bill*, 10 John., 95; *People v. Williams*, 19 Wen., 377; *State v. Nash*, 7 Iowa, 347; *People v. McIntyre*, 1 Park. C. C., 371; *State v. Roberts*, 15 Mo., 28; *Wood v. Folmer*, 1 Pin. Wis., 509; *contra*, in cases of a riot, *Sloan v. State*, 9 Ind., 656; *Everett v. State*, 6 Ind., 495.

⁵ R. S., 410, § 426.

⁶ *Cochran v. Ammon*, 16 Ills., 317; *Bounty Case Cited*, 1 East, 313; *State v. Roberts*, 15 Mo., 28; *State v. Bean*, 3 N. H., 122; *Com. v. Eastman*, 1 Cush., 189; *Fitz v. State*, 14 Mo., 413.

⁷ *Rex v. Sherman*, Cas. temp. Hardw., 303.

⁸ *Reg. v. George*, Car. & M., 111; *State v. Jones*, 51 Me., 125; *Wood v. Folmer*, 1 Pin. Wis., 509.

⁹ *Com. v. Manson*, 2 Ashm., 31.

¹⁰ *Hawkins v. State*, 13 Ga., 322.

¹¹ *Rex v. Scott*, 3 Burr., 1262; *Turpin v. State*, 4 Blackf., 73.

¹² 1 Bish. Cr. P., §§ 1022, 1023.

ciency or informality in the complaint, or on account of any informality in the warrant, or because it is not under the seal of the judge or justice, but the warrant may be amended by the judge or justice of the peace at any time pending the proceedings."¹

§ 81. *Continued.* — The statute does not authorize the amendment of the complaint, yet it has been held in other states that the complaint in respect to being amended stands on the same foundation with a criminal information, and that the magistrate may or may not, in his discretion, allow it to be amended.²

§ 82. *Change of Venue.* — The statute provides that "any person arrested on any criminal charge, and taken before any justice of the peace for examination, may, previous to the commencement of any such examination, make oath that it is his belief that said justice is so prejudiced against him that he cannot have a fair and impartial investigation before said justice, whereupon it shall be the duty of the justice immediately to transmit all the papers connected with or belonging to such examination to the nearest justice of the peace in the same county, who is not of kin to the defendant, sick, absent from town, or interested in the event of the investigation, as counsel or otherwise, who shall proceed as if the suit had been instituted before him: *Provided*, that the officer having the defendant in charge shall hold him in his custody until the complaint shall be heard and disposed of by the justice to whom the papers shall be sent as aforesaid; and *provided*, further, that distance, as contemplated in this section, shall mean to be by the nearest traveled route."³

FORM OF OATH FOR A CHANGE OF VENUE.

You do swear by the ever-living God that it is your belief that L. M., the

¹ R. S., 402, § 359.

² 1 Bish. Cr. P., § 721; *State v. Batchelder*, 6 Vt., 479, 488; *Anonymous*, Comb, 45; *Rex v. Coffe*, 1 Lev., 189; *State v. Stebbins*, 29 Conn., 463; *State v. Rowley*, 12 Conn., 101, 106; and see *Ballance v. Curtenius*, 3 Gilm., 449; *Jackson v. Warren*, 32 Ills., 331.

³ *Laws*, 1873, 75, § 1. In Iowa, under a somewhat similar statute, it was held that the accused was entitled to a second change of venue on the ground of prejudice of the second justice. *State v. Minski*, 7 Iowa, 336.

justice before whom you are taken for examination, is so prejudiced against you that you cannot have a fair and impartial investigation before him.

§ 83. **Examination, how Conducted.** — According to the strict construction of the statute, the magistrate should examine the witnesses for the prosecution as well as for the defense;¹ but no magistrate should insist upon doing so to the exclusion of the complainant or the accused or their respective counsel. So far as the accused is concerned in all criminal prosecutions, the Constitution gives him the right to appear and defend in person and by counsel to demand the nature and cause of the accusation and to have a copy thereof; to meet the witnesses face to face, and to have process to compel the attendance of witnesses in his behalf.² The statute requires the witnesses to be examined on oath in the presence of the party charged.³ The prosecution begins to give evidence and must prove the defendant to be guilty of the offense charged against him before the latter can be called on for his defense.⁴ The statutes, of 1 & 2 Phil. & Mary C., 13, §§ 4, 5; 2 & 3 Phil. & Mary C., 10, passed in 1554 and 1555, which are now in force in this state, except so far as they are modified by our statute,⁵ require the evidence to be reduced to writing and certified to the circuit court. Although it has not been customary, or heretofore been deemed necessary, for the magistrate so to do, yet there are very many good reasons why it should be done. It is important that the evidence should be reduced to writing, in order that the witness may be tied down to the first narrative, and not left open to the influence of those impressions, either of pity or of revenge, which may affect him during the interval,⁶ and in case of the decease of the witness his testimony would be admissible on the trial of the accused for the offense.⁷

¹ R. S., 402, § 360.

² R. S., 60, Con. of Ills., Art. II., § 9.

³ R. S., 402, § 360.

⁴ 1 Arch. C. P. & Pl., 385.

⁵ R. S., 269, § 1; 1 Bish. Cr. P., §§ 1091, 1092, 1093.

⁶ 1 Chitty Cr. L., 79.

⁷ 1 Greenl. Ev., §§ 163, 164; 1 Bish. Cr. P., §§ 1093-1099.

FORM OF OATH OR AFFIRMATION TO WITNESSES ON THE EXAMINATION.

You do swear by the ever-living God¹ (or "*You do solemnly, sincerely and truly declare and affirm*"²) that the evidence you shall give between the People of the State of Illinois and C. D., in relation to any matter connected with the charge made against him, now in hearing, shall be the truth, the whole truth, and nothing but the truth.

§ 84. Evidence — Place and Time. — In all cases it must be proved that the offense was committed within the county.³ Where the jurisdiction of the officer does not extend all over the county, it must be shown to be within the jurisdiction of such officer before whom the accused is brought.⁴ This proof is necessary to give the magistrate jurisdiction, and if it appears that the offense was committed out of the county the accused has a right to be discharged.⁵ The time need not be proved as alleged unless it is the essence of the offense.⁶

§ 85. Variance. — The statute provides that the witnesses shall be examined in relation to any matter connected with such charge which he may deem pertinent.⁷ This clearly implies that they shall not be examined in relation to any other charge. Therefore it seems that if a party is charged in a complaint with stealing a horse, evidence in relation to matters connected with the offense of stealing a cow or of murder, should be excluded, for these are different offenses.⁸

¹ It is provided by statute that the person swearing shall with his hand uplifted swear by the ever-living God, and shall not be compelled to lay the hand on or kiss the Gospels. R. S., 725, § 3.

² Where the witness has conscientious scruples against taking an oath, he may make his solemn affirmation in this form. R. S., 725, § 4.

³ Rice v. People, 38 Ills., 435; Jackson v. People, 40 Ills., 405; Sattler v. People, 59 Ills., 68.

⁴ 1 Bish. Cr. P., §§ 372-375; State v. Cotton, 4 Fost., 143; McBride v. State, 10 Humph., 615; State v. Williams, 4 Ind., 234; State v. Welker, 14 Mo., 398.

⁵ 1 Bish. Cr. P. § 384; 1 Barb. Cr. L., 397; Sattler v. People, 59 Ills., 68.

⁶ 1 Arch. C. P. & Pl., 389; Gebhart v. Adams, 23 Ills., 399; Koop v. People, 47 Ills., 327.

⁷ R. S., 402, § 360.

⁸ 1 Bish. Cr. P., §§ 485, 486; 1 Greenl. Ev., § 65; Gutchins v. People, 21 Ills., 642.

And this seems reasonable, for the accused may come prepared with witnesses to prove his innocence of the offense with which he is charged in the complaint while he could not be expected to be prepared to prove his innocence of every offense of which *prima facie* evidence of his guilt could be produced. The safer and better course to pursue in case the accused is really guilty of a different offense from the one charged in the complaint, is to have another complaint made, charging him with such offense, on which he can be examined and held to bail.

§ 86. **Variance in the Description of a Written Instrument, etc.** — If a written instrument or record is set out as the foundation of the charge in the complaint, and the date and place is stated as a part of the description of the instrument or record, any—the slightest—variance between the time¹ or place² as stated, or in any other matter of description appearing from the written instrument³ or record when produced, will make it inadmissible in evidence.⁴ But the omission of the letter C in the place for marking bank bills with letters in the description of the bill was held to be immaterial.⁵

§ 87. **Burden of Proof.** — Every material fact necessary to constitute the crime must be proved by the prosecution,⁶ for the prisoner is presumed to be innocent of the offense charged.⁷ If the proof shows positively that one of two or more persons have committed a crime, but leaves it uncertain which

¹ 1 Arch. C. P. & Pl., 389.

² Id., 390.

³ Higgins v. Lee, 16 Ills., 495; Crittenden v. French, 21 Ills., 599; Spangler v. Pugh, 21 Ills., 85.

⁴ Com. v. Varney, 10 Cush., 403; Hart v. State, 20 Ohio, 49; Leidig v. Rawson, 1 Scam., 272; Hall v. Blaisdell, 1 Scam., 332; Plumleigh v. Cook, 13 Ills., 669; Phelan v. Andrews, 52 Ills., 486; Higgins v. Lee, 16 Ills., 495; Crittenden v. French, 21 Ills., 599; Spangler v. Pugh, 85; Streeter v. Streeter, 43 Ills., 155.

⁵ Quigley v. People, 2 Scam., 301.

⁶ 1 Bish. Cr. P., § 1057; Hopps v. People, 31 Ills., 394; Com. v. McKee, 1 Gray, 61; Chase v. People, 40 Ills., 358.

⁷ 1 Bish. Cr. P. § 1057; Thomas v. Dunaway, 30 Ills., 373; People v. Bodine, 1 Denio, 281; Crilley v. State, 20 Wis., 244.

is the guilty party, all must be acquitted.¹ Where several are jointly indicted for robbery or other crime, and the evidence shows that they all acted together, each aiding in his own way, all are guilty though they did not actually meet together and agree to commit the crime.²

DEFENSES.

§ 88. **Alibi.** — The accused may show in answer to the charge against him that at the time the alleged crime was committed he was in a place other than the one in which he must have been in order to commit it. This is called “proving an alibi.”³ Evidence of an alibi, whether sufficient to render the guilt of the accused impossible or only improbable, is for the consideration of the magistrate, and the accused is entitled to the benefit of any reasonable doubt the magistrate may entertain upon this point.⁴ Where the defendant attempts to prove an alibi and fails to do so, it should have no greater weight to convince the magistrate of his guilt than the failure to prove any other important item of defense, and should not, generally speaking, operate to his prejudice.⁵ It is for the prosecution to prove in the first instance that the defendant was present at the time the offense was committed, for if he was not there, he could not have committed the offense, and the presumption of innocence which attaches to the accused at each step of the case⁶ until rebutted raises the presumption that the defendant was not present at that time, which the prosecution must overcome by a preponderance of evidence or the accused should be acquitted.⁷

¹ *Campbell v. People*, 16 Ills., 17; *Frazee v. Milk*, 56 Ills., 435; *Rex v. Richardson*, 1 Leach, 4th Ed., 387.

² *Miller v. People*, 39 Ills., 458; *Stinson v. People*, 43 Ills., 397; *Bell v. Mallory*, 61 Ills., 167.

³ 2 Bish. Cr. P., § 29.

⁴ *Miller v. People*, 39 Ills., 458.

⁵ *Id.*; *Foller v. State*, 16 Ohio S., 583; *Fife v. Com.*, 5 Casey Pa., 429.

⁶ *West v. State*, 1 Wis., 209; *People v. Dixon*, 4 Park. C. C., 651.

⁷ *Rex v. Hilditch*, 5 Car. & P., 299; *French v. State*, 12 Ind., 670; but see *Rex v. Findon*, 6 Car. & P., 132; *Reg. v. Briggs*, 2 Moody & Ry., 199.

§ 89. *Character.* — In all criminal cases, whether the case is doubtful or not, the accused may give in evidence his general or uniform good character as a man and a citizen.¹ The reason of the rule is that a man of good character is less likely to commit a crime than one whose character is bad,² and this fact is a circumstance which should be taken into consideration by the magistrate or jury in determining the guilt or innocence of the accused.³ Such evidence is not restricted to the trait of character in issue, nor is it required to bear any analogy to the nature of the charge.⁴ But the prosecution is not allowed to call witnesses to the general bad character of the accused unless to rebut the evidence of his good character already adduced by him;⁵ and even then the prosecution can only give evidence of the general bad character of the accused,⁶ and cannot give evidence of other specific acts or offenses done or committed by him tending to impeach his character,⁷ unless such evidence has a direct tendency to prove the particular crime for which the prisoner stands charged.⁸ It is not even permissible, as a general rule, to show that the accused has committed other crimes of the same kind as the one for which he is being examined; as, for instance, if he is being examined for larceny, to show that he has committed at other times and places other and disconnected larcenies;⁹ or,

¹ 3 Greenl. Ev., § 25; 1 Bish. Cr. P., §§ 1062–1063; *Hopps v. People*, 31 Ills., 385; *Jupitz v. People*, 34 Ills., 521; *Conkwright v. People*, 35 Ills., 207.

² *Hopps v. People*, 31 Ills., 387.

³ *Jupitz v. People*, 34 Ills., 521; *Hopps v. People*, 31 Ills., 387; *Conkwright v. People*, 35 Ills., 207.

⁴ *Hopps v. People*, 31 Ills., 388; *Jupitz v. People*, 34 Ill., 521; *Stephens v. People*, 4 Park., C. C., 396; *People v. Bodine*, 1 Denio, 28; but see 3 Greenl. Ev., § 25; 1 Bish. Cr. P., § 1063.

⁵ *People v. White*, 14 Wen., 111; *State v. Jackson*, 17 Mo., 544; *Thompson v. Church*, 1 Root, 312.

⁶ 1 Arch. C. P. & Pl., 400, 401; *McDaniel v. State*, 8 Sm. & M., 401.

⁷ *Gordon v. State*, 3 Iowa, 410; *Stone v. State*, 4 Humph., 27.

⁸ 1 Bish. Cr. P., §§ 1065, 1066, 1067.

⁹ *Barton v. State*, 18 Ohio, 221; *Cole v. Com.*, 5 Grat., 696; *Reg. v. Butler*, 2 K. & K., 221; *State v. Martin*, 34 Mo., 85; *Albright v. State*, 6 Wis., 73.

if for riot, to show that he has been engaged in other riots;¹ or, if for murder of a particular person by poison, to show the poisoning of another person at another time and place.² Much less is it permissible so show a different sort of a crime committed by the accused.³ But where the defense is insanity, and the coolness and unconcern of the prisoner at the time he committed the homicide are relied upon as justifying inferences favorable to the plea, it is competent to show that the prisoner had been in early years engaged in the perilous calling of smuggling, as tending to rebut the inference that his deportment on the fatal occasion was attributable to a want of sanity.⁴ If the accused chooses to give no evidence in relation to his character, the magistrate or jury is or are not at liberty to indulge in conjecture that his character is bad in order to infer that he is guilty of the particular crime charged;⁵ for in point of law every defendant on trial for a particular crime is presumed to be innocent of both it and of every other crime, until the contrary is duly shown in evidence.⁶ It has, however, been held in Maine that the omission of the accused to furnish evidence of his previous good character may be called to the consideration of the jury in support of the prosecution.⁷

§ 90. *Statute of Limitations.*— If the offense is barred by the statute of limitations, the prisoner should be discharged. If the accused is charged with an offense requiring an indictment, and there will be no court at which an indictment may be found before the offense will be barred, it will be useless for the magistrate to proceed with the examination. The following are the provisions of the statute in relation to the time of commencing prosecutions:

¹ *State v. Benton*, 15 N. H., 169; *Com. v. Campbell*, 7 Allen, 541.

² *Farrar v. State*, 2 Ohio S., 54; *Ogletree v. State*, 28 Ala., 693; and see *Albright v. State*, 6 Wis., 73.

³ 1 Bish. Cr. P., § 1064; *Hopps v. People*, 31 Ills., 385.

⁴ *Hopps v. People*, 31 Ills., 385.

⁵ *Ackley v. People*, 9 Barb., 609; *People v. Bodine*, 1 Denio, 281; *State v. Upham*, 38 Me., 261.

⁶ 1 Bish. Cr. P., § 1061.

⁷ *State v. McAllister*, 24 Me., 139.

§ 91. **For Murder or Manslaughter.** — “An indictment for the crime of murder or manslaughter may be found at any period after the death of the person alleged to have been killed.”¹

§ 92. **For Arson or Forgery.** — “An indictment for arson or forgery may be found at any time after the commission of the crime.”²

§ 93. **For Other Felonies.** — “All indictments for other felonies must be found within three years next after the commission of the crime, except as otherwise provided by law.”³

§ 94. **For Other Offenses, Etc.** — “All prosecutions by indictment or otherwise, for misdemeanors, or for any fine or forfeiture under any penal statute, shall be commenced within one year and six months from the time of committing the offense or incurring the fine or forfeiture except as otherwise provided by law.”⁴

§ 95. **Time of Absence not Counted.** — “No period during which the party charged was not usually and publicly resident within this state shall be included in the time of limitation.”⁵

§ 96. **Time of Pendency of Proceedings not Counted.** — “When an indictment, information or suit is quashed, or the proceedings on the same are set aside, or reversed on writ of error, the time during the pendency of such indictment, information or suit, so quashed, set aside or reversed, shall not be reckoned within the time limited by this act, so as to bar any new indictment, information or suit for the same offense.”⁶

§ 97. **Former Acquittal.** — Where a person who is accused of having committed a criminal offense has by collusion and contrivance of the witnesses, the complainant and the justice of the peace been arrested and discharged on bail, he may be again arrested by a warrant issued by another justice of the

¹ R. S., 398, § 313.

² Id., § 314.

³ Id., § 315.

⁴ Id., § 316.

⁵ Id., § 317.

⁶ Id., § 318.

peace, and required to give bail in a larger amount for the same offense.¹ So where a person accused of the crime of murder was duly examined before a justice of the peace and admitted to bail to answer to a charge of manslaughter—was again arrested on the same charge before another justice, when the justice before whom he was brought, on being advised of the prior proceedings, discharged him—was again arrested for the third time on the same charge before still another magistrate, and on examination was committed to jail to answer to the charge of murder, on a writ of *habeas corpus* being sued out, it was held that the last magistrate had jurisdiction of the case.²

§ 98. **Discharge.** — The statute provides that “if it appears to the judge or justice of the peace, upon the whole examination, that no offense has been committed, or that there is no probable cause for charging the prisoner with the offense, he shall be discharged.”³

§ 99. **Bail or Commitment.** — “If it appears that an offense has been committed, and that there is probable cause to believe the prisoner guilty, and if the offense is bailable by the judge or justice of the peace, and the prisoner offers sufficient bail, it shall be taken and the prisoner discharged; but if no sufficient bail is offered, or the offense is not bailable by the judge or justice, the prisoner shall be committed to jail for trial.”⁴

V. PROCEEDINGS AFTER EXAMINATION.

§ 100. **Bail — Definition.** — As we have seen from the provision of the statute, “if the offense is bailable by the judge or justice of the peace, and the prisoner offers sufficient bail, it shall be taken and the prisoner discharged.”⁵ All offenses except capital offenses, where the proof is evident or the pre-

¹ *Bulson v. People*, 31 Ills., 409.

² *In re McIntyre*, 5 Gilm., 422.

³ R. S., 403, § 362.

⁴ *Id.*, § 363.

⁵ R. S., 403, § 363.

sumption great,¹ are on such examinationailable by a judge or justice of the peace before the accused has been committed to jail for want of good and sufficient bail.² Capital offenses are such as are punishable with death.³

§ 101. Provisions of the Statute as to the Sufficiency of Bail.—The statute provides that “each of the bail shall be worth the amount of bail expressed in the recognizance over and above the amount exempt from execution, but the court, judge or justice of the peace or officer, in taking bail, may allow more than two bail to justify severally in amounts less than that expressed in the recognizance, if the whole qualification be equivalent to two sufficient bail.”⁴

§ 102. Proof of Sufficiency of Bail. — “The court, judge, justice of the peace or officer may examine the bail, on oath touching their sufficiency, and may receive other evidence for or against the same, in such manner as he may deem proper.”⁵

§ 103. What Bail Sufficient — Time may be Given to Procure.—The officer is not required to examine the bail on oath touching their sufficiency, but in all cases where the circumstances and responsibility of the bail are not personally known to him, it is the safer and better way to require them to justify; and then, if he is satisfied that they are not responsible, he should refuse to receive them. One rule, it is said, should be uniformly adopted, and that is, to require such sureties as are possessed in their own right of real estate within the county to such an amount as that upon a sale of it at public auction the full amount of the sum for which the bail is bound may be realized. Bail not possessed of this amount may doubtless in some instances be safely taken; but in all cases bail possessing under a clear title real estate in the county should be preferred.⁶ The bail should be sufficient in amount

¹ R. S., 396, § 294; R. S., 59, Con. Ills., Art. II., § 7

² R. S., 396, § 299; Id., 403, § 17.

³ Burrill Law Dic., 246.

⁴ R. S., 396, § 300.

⁵ Id., § 301.

⁶ Barb. Cr. L., 578.

and the sureties such as to procure the appearance of the prisoner for trial. The magistrate has no right to require more, for it would be excessive, nor less, for it would be insufficient, and the magistrate will be liable therefor if the prisoner does not appear;¹ but if he acts according to his best discretion, and without partiality or malice, he will be fully justified.² The magistrate may permit the prisoner to remain a short time in the custody of an officer, to afford him an opportunity to procure bail, if there is a prospect of his being able to do so; but this privilege the prisoner cannot claim as a matter of right.³

§ 104. Who may be Taken as Bail. — An attorney may become surety for his client.⁴ But a person convicted of an infamous crime, as perjury, cannot be received as bail.⁵ Formerly a married woman could not become surety for another, and it was supposed that she could not enter into a recognizance as principal, for the reason that she could not contract;⁶ but under a recent statute she is authorized to contract,⁷ and now may become surety for another or enter into a recognizance in her own behalf the same as any other person. The disability of an infant to make a contract, except in certain cases, still continues, and he cannot become surety for another; and it has been supposed that he lacks capacity to enter into a recognizance as principal in his own behalf and must procure some one to be bound for him;⁸ but the better opinion seems to be that he may be bound by all acts which he is obliged

¹ Barb. Cr. L., 576; *People v. Dixon*, 4 Park., 651; *People v. Van Horn*, 8 Barb., 159.

² *Davis J.*, 88; Barb. Cr. L., 579.

³ Barb. Cr. L., 580.

⁴ *Id.*, 578; *Doug.*, 466; 1 *Burn.*, 320.

⁵ *Rex v. Edwards*, 4 T. R., 440.

⁶ 4 *Black. Com.*, 254; Barb. Cr. L., 513; 3 *M. & Sel.*, 1; 1 *Arch. C. P. & Pl.*, 176.

⁷ *R. S.*, 576, § 6.

⁸ 4 *Black. Com.*, 254; Barb., Cr. L., 513; 2 *Hawk C.*, 15, § 89; 1 *Chitty Cr. L.*, 104.; *Semm's Case*, 11 *Leigh*, 665.

by statute or law to do.¹ Therefore if an infant, when required by statute or law so to do, enters into a recognizance, he will be bound. If sureties who are pecuniarily sufficient present themselves, the magistrate who sits to receive bail has no right to reject them because he does not like their politics or their personal character.²

§ 105. **Recognizance — Form.** — By statute "all recognizances in criminal cases shall be taken to the People of the State of Illinois, and when not taken in a court of record in open court shall be signed by the persons entering into the same and approved and certified by the judge, justice of the peace or other officer taking the same."³

§ 106. **Condition.** — "The recognizance, except when otherwise provided, shall be so conditioned as to bind the accused or witness personally to appear at the court having jurisdiction of the offense on the first day of the next term thereof, to be holden in the county (specifying the time and place of holding the same), or, if the court is then sitting, on some day of the term, to be designated therein, and from day to day, and from term to term, and from day to day of each term, until the final sentence or order of the court, to answer for the offense charged (or, if an indictment has been found or information filed, to answer such indictment or information; or, if the person bound is a witness, to testify in the case), and to abide such final sentence or order, and not depart without leave."⁴

§ 107. **Money cannot be Taken Instead of a Recognizance.** — The court⁵ or officer has no right to receive money in lieu of, or as a substitute for, a recognizance, for the statute requires a recognizance, and nothing else will do.⁶ If an officer takes

¹ *People v. Mullen*, 25 Wen., 698; *People v. Moore*, 4 Denio, 518; *U. S. v. Bainbridge*, 1 Mason, 83; *Winslow v. Anderson*, 4 Mass., 376; *Baker v. Lovett*, 6 Mass., 8.

² *Bish. Cr. P.*, § 260; *Rex v. Badger*, 4 Q. B., 463; *Dav. & M.*, 375.

³ *R. S.*, 396, § 295.

⁴ *Id.*, § 297.

⁵ *Butler v. Foster*, 14 Ala., 323.

⁶ *Smart v. Cason*, 50 Ills., 195.

money instead of a recognizance, as required by statute, and allows the prisoner to go at large, he will be liable criminally for the escape and may be fined therefor, not exceeding one thousand dollars, and confined in the county jail not exceeding six months.¹ Yet in such case the money so received must be paid into the county treasury the same as if it had been collected on a recognizance.²

§ 108. **Form and Requisites of the Recognizance.**—No particular form of words is required to render a recognizance valid, provided it contains the essential requisites of such an instrument.³ A penalty containing an acknowledgment of indebtedness to the people, and a condition, are indispensable requisites of a recognizance.⁴ If it is not exactly in accordance with the statute, it may be good at common law;⁵ and when the condition contains superadded words beyond what are authorized by statute, they will not affect its validity, but may be disregarded as surplusage.⁶ A recognizance taken by a justice of the peace and entered on his docket in these words: "Jacob Kerns *v.* John Stewart, Recognizance—bail 25; Simon Elliot acknowledges himself bail in the above case," is informal and void.⁷ So an entry on the docket of the justice as follows: "The People *v.* Ambrose F. Woolsey, Milton Niles, Solomon Rundle, &c. (*naming seventeen others*) are recognized in the sum of \$100 each, conditioned for their appearance at the next court of general sessions of the peace to testify on the part of the people in the above cause," was held not to amount to a recognizance.⁸

¹ R. S., 364, § 89; *Smart v. Cason*, 50 Ills., 195.

² *Smart v. Cason*, 50 Ills., 195; *Rock Island Co. v. Mercer Co.*, 24 Ills., 35.

³ *Dean v. State*, 2 Sm. & M., 200; *Shattuck v. People*, 4 Scam., 477; *McFarlan v. People*, 13 Ills., 9.

⁴ *People v. Rundle*, 6 Hill, 506; *Caldwell v. Rundell*, 1 Jones, 293.

⁵ *Phelps v. Park*, 4 Vt., 488.

⁶ *People v. Mills*, 5 Barb., 511; *Howe v. State*, 1 Ala., 113; *State v. Wellman*, 3 Ohio, 14.

⁷ *Kerns v. Schoonmaker*, 4 Ohio, 331; see *State Treas. v. Woodard*, 7 Vt., 528; *Same v. Rolfe*, 15 Vt., 9.

⁸ *People v. Rundle*, 6 Hill, 506.

FORM OF RECOGNIZANCE ON ADMITTING A PRISONER TO BAIL.

State of Illinois, } ss.
 _____ County. }

Be it remembered that on the¹ — day² of —, A. D. 18—, C. D.,³ of the town of —, in the county aforesaid, and E. F. and G. H., of the town of —, in the said county, personally came before L. M., a justice of the peace of the county aforesaid (*or, if taken before two⁴ justices, where the prisoner has been committed, say, "before us, L. M. and A. E., two of the justices of the peace in and for said county*), and severally and respectively acknowledged themselves to owe and be indebted⁵ to the People of the State of Illinois in the sum of five hundred dollars, to be made and levied of their respective goods and chattels,⁶ lands and tenements,⁷ to the use of the said people if default shall be made in the following condition:⁸

Whereas,⁹ A. B. lately made complaint to L. M., a justice of the peace of

¹ The recognizance must be signed by the accused at the time of his discharge. *Smart v. Cason*, 50 Ills., 195; *Shattuck v. People*, 4 Scam., 477.

² The recognizance is not void because entered into on Sunday. *Johnson v. People*, 31 Ills., 472; but see *State v. Suhen*, 33 Me., 539.

³ Where the name of the cognizor is signed to the recognizance it need not be mentioned in the body of it. *Cunningham v. State*, 14 Mo., 402; *Badger & Clayton v. State*, 5 Ala., 21; *Hall v. State*, 9 Ala., 827; though it should be inserted.

⁴ A recognizance taken before two justices, when by law but one was needed, is not thereby invalid. *Shattuck v. People*, 4 Scam., 477; *McFarlan v. People*, 13 Ills., 9.

⁵ There is no difference in their legal effect between the words "are held and firmly bound," and the words "owe and are indebted." *Shattuck v. People*, 4 Scam., 478; *Mix v. People*, 26 Ills., 32.

⁶ The words "to be levied of your goods and chattels, lands and tenements," were necessary in a recognizance at common law, but under our statute they are a mere matter of form and may be omitted without impairing the legal effect of the instrument. *Shattuck v. People*, 4 Scam., 478.

⁷ The recognizance does not become a lien upon the property of the person entering into it. *Shattuck v. People*, 4 Scam., 477.

⁸ A bond with the proper condition has been held to be a sufficient recognizance. *Shattuck v. People*, 4 Scam., 477; *McFarlan v. People*, 13 Ills., 9.

⁹ It is not necessary that the recognizance should show that there has been a complaint, made, subscribed or sworn to, or an arrest of the accused, or an examination of witnesses or probable cause shown, nor that there has been a decision of the magistrate that bail be given or the accused stand committed, for when the recognizance is filed it becomes a matter of record, and these facts will be presumed. *Shattuck v. People*, 4 Scam., 481; *McCarty v. State*, 1 Blackf., 338; *People v. Blankman*, 17 Wen., 258; *People v. Kane*, 4 Denio, 531; *People v. Watkins*, 19 Ills., 117; but see *Shufeldt v. Buckley*, 45 Ills., 223.

the said county, and the said justice examined on oath the said complainant and E. F., a witness produced by him, and reduced the complaint to writing and caused it to be subscribed and sworn to by the said complainant, whereby it was charged that the said C. D. did (*insert statement of the offense,¹ as in the complaint*), and from the said complaint and examination it appeared that such offense had been committed, and that there were just and reasonable grounds for believing that the said C. D. had committed the same, whereupon the said justice issued a warrant for his arrest, and the said C. D. has since been arrested thereon and brought before the said justice, and the said justice then and there examined the witnesses in support of the prosecution, as well as those produced on behalf of the accused on oath in the presence of the said C. D. in relation to the said charge, and the matters connected therewith, and from the said examination in the presence of the said C. D., it appeared to the said justice that the said offense had been committed and that there was probable cause to believe the said C. D. guilty thereof, and the said justice thereupon ordered the said C. D. to enter into a recognizance with two good and sufficient sureties in the sum of five hundred dollars² conditioned according to law.

Now, therefore, the condition of this recognizance is such that if the said

¹ The recognizance need not set out the offense charged with the technical accuracy required in an indictment. It will be sufficient if the offense be substantially described. 1 Arch. C. P. & Pl., 196; Shattuck v. People, 4 Scam., 481; People v. Baughman, 18 Ills., 152; Young v. People, 18 Ills., 566; McFarlan v. People, 13 Ills., 9; Besimer v. People, 15 Ills., 439; Mix v. People, 26 Ills., 32. It is sufficient to set out the offense in the language of the statute. People v. Baughman, 18 Ills., 152; or simply to insert the name of the offense, Shattuck v. People, 4 Scam., 481. The words "to answer to an indictment," Gildersleeve v. People, 10 Barb., 35, "to answer to the charge of a felony," Cotton v. State, 7 Texas, 547; Fowler v. Com., 4 Monr., 128; "to answer to an indictment for adultery," Besimer v. People, 15 Ills., 439; "of being guilty of the accessory of manslaughter," McFarlan v. People, 13 Ills., 9; "to answer to a charge of larceny," Minor v. State, 1 Blackf., 236; "with stealing from the store" of certain parties, Young v. People, 18 Ills., 566; "for the crime of passing counterfeit money," Mix v. People, 26 Ills., 32; "of passing counterfeit money," Shattuck v. People, 4 Scam., 481, have respectively been held to be a sufficient statement of the offense in a recognizance. It has been held that if the recognizance undertake to recite a specific charge, a charge must be recited for which an indictment will lie; otherwise the recognizance would be void, Bailey v. State, 4 Texas, 417; but under our statute, R. S., 396, § 302, the recognizance in such case would probably be valid.

² The recognizance need not state that the amount of the bail was fixed by the court or magistrate. Vancel v. People, 16 Ills., 120.

C. D. shall personally be and appear at the circuit court¹ on the first day of the next term thereof to be held at the court-house in the town (or "*village*" or "*city*") of —, in the said county of —, on the²— day of —, A. D. 18—, at the opening of the court on that day, and from day to day, and from term to term, and from day to day of each term, until the final sentence or order of the court to answer for the said offense,³ and abide such final sentence or order, and not depart without leave, then this recognizance to be void, otherwise to remain in full force and virtue.

C. D.⁴ [SEAL.⁵]

E. F. [SEAL.]

G. H. [SEAL.]

Taken,⁶ subscribed and acknowledged }
before and approved by me on the day }
and year first above written.⁷

L. M., J. P.⁸

¹ The recognizance must show upon its face the court to which the defendant is bound to appear. *State v. Rye*, 9 Yerg., 386. If made returnable before a judge at chambers the prisoner is not bound to appear there. *Corlies v. Waddell*, 1 Barb., 355.

² If it bind the accused to appear on a day when the court does not sit, it is void. *State v. Sullerant*, 3 Yerg., 281; *People v. Mack*, 1 Park Cr. R., 567; *Butler v. State*, 12 Sm. & M., 470.

³ Probably a recognizance to appear and answer what shall be objected against the party would be good. *People v. Keober*, 7 Hill, 42. Where the condition of the recognizance omitted the words "to answer to said offense," the recognizance was held not to be void for that reason. *State v. Davidson*, 20 Mo., 212.

⁴ The recognizance must be signed. *R. S.*, 396, § 296; *Shattuck v. People*, 4 Scam., 477; *Smart v. Cason*, 50 Ills., 195; *People v. Huggins*, 10 Wen., 471.

⁵ The recognizance need not be under seal. *Slaton v. People*, 21 Ills., 28; *State v. Root*, 2 Rep. Const. Ct., 123; *Kearns v. State*, 3 Blackf., 336.

⁶ The words "Taken and acknowledged before me the 12th day of March, A. D. 1855,— JOHN A. MAXEY, J. P., [SEAL,]" were held to be a sufficient certificate, and that they implied that the recognizance was approved by the magistrate. *Lawrence v. People*, 17 Ills., 172; *People v. Watkins*, 19 Ills., 118.

⁷ A certificate of the magistrate, is essential to the validity of the recognizance; but it will not be adjudged insufficient for want of form, *R. S.*, 396, § 302; *Lawrence v. People*, 17 Ills., 172; *Bacon v. People*, 14 Ills., 312; *State v. Carr*, 4 Iowa, 290, and need not be under seal nor certified under the seal of the justice; *Slaton v. People*, 21 Ills., 28.

⁸ The letters "J. P." mean justice of the peace. *Shattuck v. People*, 4 Scam., 478.

SHORT FORM OF RECOGNIZANCE.

State of Illinois, } ss.
 _____ County. }

Be it remembered that on the — day of —, A. D. 18—, C. D., E. F., G. H., personally came before L. M., a justice of the peace of said county, and severally and respectively acknowledged themselves to owe and be indebted to the people of the State of Illinois,¹ in the sum of five hundred dollars² if default shall be made in the following condition

The condition of this recognizance is such that if the said C. D., shall personally be and appear at the circuit court on the first day of the next term thereof, to be held at the court-house, in the town (or village or "city") of —, in said county of —, on the — day of —, A. D. 18—, at the opening of the court on that day, and from day to day, and from term to term, and from day to day of each term, until the final sentence or order of the court to answer for the offense of passing counterfeit money (*or insert the name of the offense as in the warrant, or a short statement of the offense as in the complaint*) and to abide such final sentence or order and not depart without leave, then this recognizance to be void, otherwise to remain in full force and virtue.

C. D.
 E. F.
 G. H.

Taken, subscribed and acknowledged }
 before and approved by me, on the day }
 and year first above written. }
 L. M., J. P.

§109. No Recognizance Voidable for Want of Form. — The statute provides that "every recognizance taken or attempted to be taken in pursuance of this act, shall by all courts in this state be held and adjudged to have been entered into voluntarily,³ and shall not be set aside or adjudged insufficient

¹ Where instead of the words "in the sum of five hundred dollars" the words used were in substance, "the said C. D. in the sum of two thousand dollars, and the said E. F. and G. H. each the sum of two thousand dollars respectively," the recognizance was held to be in effect a joint and several obligation to pay the sum of two thousand dollars, and not an obligation that would require the payment of six thousand dollars to satisfy the recognizance. *Banta v. People*, 58 Ills., 434.

² A recognizance is not vitiated because taken for a less sum than is indorsed on the writ. *Chumaseo v. People*, 18 Ills., 405. If taken by a sheriff for a larger amount it is a nullity. *Lawrence v. People*, 17 Ills., 172.

³ Sureties upon a recognizance cannot plead the duress of their principal in the discharge of their liability. *Plummer v. People*, 16 Ills., 358; *Huggins v. People*, 39 Ills., 241. The imprisonment of the principal is not such a duress as releases him unless the imprisonment was unlawful. *Huggins v. People*, 39 Ills., 241; *Plummer v. People*, 16 Ills., 358.

for want of form, either in the recognizance or in the certificate of the officer taking the same.”¹

§ 110. **Recognizance Delivered to Clerk.** — “All recognizances taken in criminal cases shall be delivered to the clerk of the court before which the accused or witness is bound to appear, on or before the day mentioned in such recognizance for his appearance.”²

§ 111. **Recognizance Forfeited.** — “When any person who is accused of any criminal offense shall give bail for his appearance, and such person does not appear in accordance with the terms of the recognizance, the court shall declare such recognizance forfeited, and the clerk of the court shall thereupon issue a *scire facias* against such person and his sureties, returnable on the first day of the next term of the court, to show cause why such judgment should not be rendered against such person and his sureties for the amount of the recognizance, which *scire facias* shall be served by the sheriff of the county where the court is held, upon such person and his sureties by reading the same to the defendants named in such *scire facias*, at least five days before the first day of the term to which the same is returnable; and in case the person aforesaid cannot be found by the sheriff, he shall make return of that fact to the court. The court shall thereupon enter judgment by default against the defendants for the amount of the recognizance, unless the defendants shall appear and defend such cause, and if the defendants shall appear and interpose a defense, then the cause shall be tried in the same manner as other causes of like nature, after any such recognizance shall be declared forfeited as aforesaid. Before judgment, the court may in its discretion set aside such forfeiture upon the accused being brought or coming into open court, and showing to the court, by affidavit, that he was unable to appear in court according to the terms of the recognizance, by reason of sickness, or some other cause which shall satisfy the court that the accused had not been guilty of any laches

¹ R. S., § 302.

² Id., § 303.

or negligence: *Provided*, that no such forfeiture or recognizance shall be set aside until the accused shall pay the costs of such recognizance.”¹

§ 112. **Neglect to Record or Formal Defects no Bar.** — “Such action shall not be barred or defeated, nor shall judgment be arrested by reason of neglect or omission to note or record the default of any principal or surety at the term when it happens, nor by reason of a defect in the form of the recognizance, if it sufficiently appears, from the tenor thereof, at what court the party or witness was bound to appear, and that the court or magistrate before whom it was taken was authorized by law to require and take such recognizance.”²

§ 113. **Procedure on the Forfeiture of the Recognizance — Scire Facias.** — A recognizance when signed, approved and certified by the magistrate and delivered to the clerk of the circuit court, becomes a record,³ and imports absolute verity, and no averment can be taken against it.⁴ Then and not before,⁵ at the first term to which the principal was bound to appear or at any succeeding term of the court,⁶ upon default in performing its condition, a judgment of forfeiture may be taken against the principal and his sureties, although⁷ the objection that it does not appear to have been filed or made a matter of record previous to the judgment of forfeiture cannot be availing unless the specific objection is made on the trial.⁸ Such judgment is not in this state for a sum of money, but is followed by a *scire facias* calling upon the principal and sureties to know why judgment should not be awarded against them for the amount of the recognizance, to be followed by

¹ R. S., 397, § 310.

² *Id.*, § 311.

³ *Shattuck v. People*, 4 Scam., 478; *Raysor v. People*, 27 Ills., 190; *People v. Watkins*, 19 Ills., 117.

⁴ *People v. Watkins*, 19 Ills., 117.

⁵ *Bacon v. People*, 14 Ills., 312; *O'Brien v. People*, 41 Ills., 456; *Bulson v. People*, 31 Ills., 409.

⁶ *Landes v. People*, 39 Ills., 79; *Norfolk v. People*, 43 Ills., 9; *State v. Brown*, 16 Iowa, 314.

⁷ *Thomas v. People*, 13 Ills., 696; *Bacon v. People*, 14 Ills., 312.

⁸ *O'Brien v. People*, 41 Ills., 456.

execution,¹ and must be entered before the *scire facias* can issue.² The *scire facias* stands in the place of a summons and declaration, fills the same office³ and should contain every averment necessary to show a right of recovery.⁴ It should clearly show before what court the recognizance was entered into, if before a court;⁵ if before a justice, that he was a justice of the peace of the county in which the recognizance was taken;⁶ that the recognizance was taken and approved by him;⁷ that the recognizance was delivered to the clerk of the proper court before judgment of forfeiture;⁸ that a judgment of forfeiture had been entered,⁹ and should contain sufficient averments to show the jurisdiction of the officer taking the same.¹⁰ It is sufficient to set forth the recognizance according to its operation and legal effect, or it may be set out verbatim, and the court will decide upon its effect.¹¹ It is not necessary to aver the special facts by which the officer became authorized to proceed in the particular case,¹² for on filing the recognizance these will be presumed.¹³ So where it does not appear upon the face of the recognizance where it was taken, nor of what county the justice was an officer, it will be presumed that it

¹ Bacon v. People, 14 Ills., 312; People v. Watkins, 19 Ills., 118.

² Bacon v. People, 14 Ills., 312; Combs v. People, 39 Ills., 183; Farris v. People, 58 Ills., 27; Kennedy v. People, 15 Ills., 418; Connor v. People, 20 Ills., 381; Thomas v. People, 13 Ills., 413.

³ Thomas v. People, 13 Ills., 696; Lawrence v. People, 17 Ills., 172; Farris v. People, 58 Ills., 28; Connor v. People, 20 Ills., 382.

⁴ Farris v. People, 58 Ills., 28; Thomas v. People, 13 Ills., 696; Lawrence v. People, 17 Ills., 172; Connor v. People, 20 Ills., 382.

⁵ Thomas v. People, 13 Ills., 696.

⁶ McFarlan v. People, 13 Ills., 9.

⁷ Bacon v. People, 14 Ills., 312; Lawrence v. People, 17 Ills., 172; State v. Carr, 4 Iowa, 290.

⁸ Bacon v. People, 14 Ills., 312; Connor v. People, 20 Ills., 382.

⁹ Thomas v. People, 13 Ills., 696; Kennedy v. People, 15 Ills., 418; Connor v. People, 20 Ills., 381; Farris v. People, 58 Ills., 29; Eubank v. People, 50 Ills., 496;

¹⁰ Noble v. People, 4 Gilm., 433; Raysor v. People, 27 Ills., 190.

¹¹ Lawrence v. People, 17 Ills., 172.

¹² People v. Kane, 4 Denio, 531.

¹³ Shattuck v. People, 4 Scam., 477; McCarty v. State, 1 Blackf., 338; People v. Blankman, 17 Wen., 252.

was taken in the proper county, and that the justice was an officer of such county, until the contrary is shown.¹ The omissions of the record may be supplied by the proper averments;² as where it does not appear upon the face of the recognizance that it was taken and approved by the justice and by him certified into the circuit court, it may be alleged and proved that the recognizance was taken, approved and certified by the justice in accordance with the statute.³ Where the name of the principal is erroneously stated in the body of the recognizance, but the instrument is signed correctly, the defect may be cured by alleging and proving that the person who signed the instrument was actually the person required to appear and answer.⁴

§114. What not a Defense to a Recognizance. — It is no defense to a *scire facias* that the justice before whom the recognizance was taken had not properly qualified, for if he was an acting justice, that was sufficient;⁵ or that the justice did not conduct the examination properly by refusing to grant a change of venue, or otherwise;⁶ or that no indictment was found against the principal, for there must be an appearance in order to avoid default;⁷ or that the principal was examined and committed for burglary and the recognizance was given for larceny; or that the principal, after entering into the recognizance, enlisted as a soldier in the army and was prevented by military authority from appearing or from being surrendered by his sureties;⁸ or that the prisoner was confined in another county for a different charge, for the law provides a way for producing a prisoner so situated.⁹

¹ Shattuck v. People, 4 Scam., 478.

² People v. Baughman, 18 Ills., 152; McFarlan v. People, 13 Ills., 9.

³ McFarlan v. People, 13 Ills., 9.

⁴ O'Brien v. People, 41 Ills., 456; but see Graves v. People, 11 Ills., 542; Vincent v. People, 25 Ills., 500.

⁵ People v. Watkins, 19 Ills., 118.

⁶ Id.

⁷ Wheeler v. People, 39 Ills., 430; People v. O'Brien, 41 Ills., 303; O'Brien v. People, 41 Ills., 456.

⁸ Ginrich v. People, 34 Ills., 449; Huggins v. People, 39 Ills., 212; Shook v. People, 39 Ills., 443.

⁹ Mix v. People, 26 Ills., 32; Brown v. People, 26 Ills., 28.

§ 115. What a Defense to a Recognizance. — It is a defense to a *scire facias* that the performance of the condition of the recognizance became impossible by the act of God;¹ as if the principal dies.² But the court may require the sureties to pay such costs as it deems equitable.³ And a plea which avers the death of the principal in the recognizance must, in order to make it good, state the time of the death.⁴ The sickness of the principal in a recognizance is a ground for a continuance, but not a defense to the *scire facias*.⁵ It is also a defense to the *scire facias* that the recognizance has been altered in a material respect by the justice,⁶ and after it has been rendered void by such alteration it cannot subsequently be made valid by the parol assent of the surety;⁷ that the accused had been tried and acquitted;⁸ that the recognizance was taken for a purpose not authorized by law;⁹ or that it was taken by a court or officer not having authority to act.¹⁰ But no matter in what way a prisoner appears before a judge of the circuit court, his offense may be inquired into, and a recognizance given by himself and his sureties will be obligatory.¹¹

§ 116. Objections not Available as a Defense to a Recognizance. — Where the clerk fails to indorse upon the recognizance the time of filing the same, he may make the indorsement at a

¹ R. S., 398, § 312; 1 Arch. C. P. & Pl., 204; *People v. Manning*, 8 Cowen, 297; *Com. v. Craig*, 6 Randolph, 731; *People v. Bartlett*, 3 Hill, 570; *Canby v. Griffin*, 3 Harring., 333.

² *People v. Watkins*, 19 Ills., 117; *People v. Manning*, 8 Cowen., 297.

³ R. S., 398, § 312.

⁴ *People v. Watkins*, 19 Ills., 117.

⁵ *Ginrich v. People*, 34 Ills., 449; *contra*, *People v. Manning*, 8 Cowen, 297.

⁶ *Vincent v. People*, 25 Ills., 500.

⁷ *Sans v. People*, 3 Gilm., 327.

⁸ *Mills v. McCoy*, 4 Cowen, 406.

⁹ 1 Arch. C. P. & Pl., 195; *Harrington v. Brown*, 7 Pick., 332; *Estes v. State*, 2 Humph., 496.

¹⁰ *Solomon v. People*, 15 Ills., 291; *Com. v. Loveridge*, 11 Mass., 337; *Vase v. Deane*, 7 Mass., 280; *Dow v. Prescott*, 12 Mass., 419; *Com. v. Otis*, 16 Mass., 198.

¹¹ *Mix v. People*, 26 Ills., 32.

subsequent term *nunc pro tunc*,¹ and where the entry of two forfeitures are made at two different terms of the same court, the last entry may be treated as surplusage.² One of several cognizors cannot raise the objection that a joint cognizor is not liable.³ Where the principal fails to appear according to the condition of his recognizance and a forfeiture is taken, the liability of the bail is fixed, and he can only show that there was no power to take the recognizance, that it is invalid, or that he has in some mode been discharged, to escape liability.⁴ The forfeiture of a recognizance may be taken at a term of the court subsequent to the term at which the prisoner was recognized to appear.⁵

§ 117. **Service of the Scire Facias.**— Upon a joint and several recognizance where service is had on one or more of the cognizors and a return of *nihil* as to the rest, it is not erroneous to enter judgment against those served with the process, without having two *nihil*s returned as to those not served⁶ although it was formally held to be necessary.⁷ When the *scire facias* is served upon the sureties and not upon the principal, the objection that the judgment was taken against the principal as well as the sureties cannot be made by the latter, for only the principal has any reason to complain of the error.⁸ Cognizors, unless personally served, cannot be condemned unless there have been returns of *nihil* upon two writs of *scire facias*.⁹

§ 118. **Judgment and Execution.**— Where the recognizance is several, the order for execution must be several,¹⁰ the judg-

¹ *McFarlan v. People*, 13 Ills., 9.

² *State v. People*, 8 Mo., 249.

³ *Mussulman v. People*, 15 Ills., 51.

⁴ *Stevens v. Hay*, 61 Ills., 400.

⁵ *Stokes v. People*, 63 Ills., 489.

⁶ *Passfield v. People*, 3 Gilm., 406; *McFarlan v. People*, 13 Ills., 9; *Wheeler v. People*, 39 Ills., 430; *Crisman v. People*, 3 Gilm., 351; *McFarlan v. People*, 13 Ills., 9.

⁷ *Alley v. People*, 1 Gilm., 112.

⁸ *O'Brien v. People*, 41 Ills., 456.

⁹ *Besimer v. People*, 15 Ills., 440.

¹⁰ *Farris v. People*, 58 Ills., 27.

ment, or more properly the order¹ for execution, must follow the recognizance,² and the fact that several are made defendants to the proceeding by *scire facias* does not make the *scire facias* joint,³ as the people can only have execution according to the form, force and effect of the recognizance.⁴ A judgment on a recognizance for failing to appear is no bar to another prosecution for the same offense⁵—not even if the judgment has been paid.⁶

§ 119. **Sureties may Surrender their Principal.**—In all cases of bail for the appearance of any person charged with a criminal offense, such person is still in supposition of the law in custody of his sureties, who are considered as his keepers,⁷ and are said to have him always upon the string and may pull it when they please to render him in their own discharge.⁸ Such sureties, or any of them, or their or his executors or administrators,⁹ may on Sunday,¹⁰ or at any other time before judgment upon the bond or recognizance, or at any place either in or out of the state,¹¹ re-seize him¹² and surrender him in their exoneration, or the principal may surrender himself to the proper officer.¹³ For the purpose of surrendering the principal “the sureties, or any of them, may require the sheriff, coroner or constable of the county where the principal may be found, to make the arrest within his county by producing a certified copy of the recognizance, and in person or

¹ Landis v. People, 39 Ills., 79.

² Chumasero v. People, 18 Ills., 405.

³ Id.; Farris v. People, 58 Ills., 29.

⁴ Chumasero v. People, 18 Ills., 405; Farris v. People, 58 Ills., 27; Sans v. People, 3 Gilm., 327.

⁵ Com. v. Thompson, 3 Litt., 284.

⁶ *Ex parte* Milburn, 9 Peters, 710.

⁷ 2 Haw. P. C. C., 15, §§ 2, 3; 1 Bish. Cr. P., § 248; Barb. Cr. L., 583; Com. v. Bronson, 14 B. Mour., 361; 6 Mod., 231.

⁸ Barb. Cr. L., 583; Anonymous, 6 Mod., 231.

⁹ Meddouscroft v. Sutton, 1 Bos. & Pul., 62; Wheeler v. Wheeler, 7 Mass., 169.

¹⁰ Barb. Cr. L., 583; 6 Mod., 231; Brown v. People, 26 Ills., 31.

¹¹ Nicholls v. Ingersoll, 7 John., 146; but see Brown v. People, 26 Ills., 31.

¹² State v. Mahon, 3 Harring., 568.

¹³ R. S., 397, §§ 305, 306; McGuire v. Town of Xenia, 54 Ills., 299.

by agent accompanying the officer to receive the person arrested, and upon tender to such officer of like fees as are allowed for executing *capias* in criminal cases;¹ or they, or any of them, may authorize or depute any other person to make the arrest;² but the person so authorized or deputed cannot substitute another person in his place, for the arrest must be made by such deputy personally, or by him in connection with others who are actually or constructively in his presence.³ After an indictment has been found, the bail may procure a *capias* to be issued upon it and have their principal arrested thereon, so as to surrender him to the sheriff in discharge of the recognizance.⁴

§ 120. **Doors Broken Open to Arrest Principal — Assistance.** — The sureties, their agent or officer, may break open the outer door of the dwelling of the principal, if not opened on demand, at midnight or at any other time, and take the principal from his bed, if that measure is necessary to make the arrest,⁵ and may if necessary call in the aid of others to assist them or him the same as an officer can do in other cases.⁶

§ 121. **Authority to take Principal.** — The statute does not require that the authority of the person deputed to make the arrest should be in writing, and probably it is not necessary, although in another state it has been held to be necessary,⁷ and probably it would be advisable that the authority should be in writing, so that the principal may know that the deputy is authorized to take him.

¹ R. S., 397, § 306; *People v. Phelps*, 17 Ills., 200.

² R. S., 397, § 305; *Nicholls v. Ingersoll*, 7 John., 146; *Boardman v. Fowler*, 1 John. C., 413.

³ *State v. Mahon*, 3 Harring., 568.

⁴ *People v. Phelps*, 17 Ills., 201.

⁵ *Nicholls v. Ingersoll*, 7 John., 156; *Com. v. Brickett*, 8 Pick., 138; *Brown v. People*, 26 Ills., 31.

⁶ *Barb. Cr. L.*, 583; *Arch. C. P. & Pl.*, 203; *State v. Mahon*, 3 Harring., 568; *Sheers v. Brooks*, 2 Hen. Black., 120; *Nicholls v. Ingersoll*, 7 John., 156.

⁷ *People v. Moore*, 2 Doug., 1.

FORM OF DEPUTATION TO TAKE PRINCIPAL.

Know all men by these presents, that we, E. F. and G. H., of the town of —, in the county of — and State of Illinois, being the same E. F. and G. H., in the within (or “*annexed*”) copy of recognizance named and mentioned, have deputed, authorized and empowered, and by these presents do depute, authorize and empower in our place and stead, and in our behalf, I. J. of the town of — in said county, to take, arrest, seize and surrender to the sheriff of the said county of —, C. D. in the within (or “*annexed*”) copy of recognizance named in exoneration of our liability upon said recognizance as sureties for the appearance of the said C. D. at the court therein mentioned, to answer for the offense therein specified and to employ such assistants as may be necessary to effect such purpose.

In witness whereof we have hereunto set our hands this — day of —, A. D. 18—.

E. F.

G. H.

§ 122. **Surrender, to whom Made.** — The statute provides that “the surrender shall be made to the sheriff of the county where the principal is required to appear or to the warden of the penitentiary when so required.”¹

§ 123. **Proceedings on Surrender.** — “On such surrender and delivery to him of a certified copy of the recognizance the sheriff or warden shall take such person into custody and by writing acknowledge such surrender, and thereupon the sureties shall be discharged² from such recognizance upon payment of all the costs occasioned by any proceeding upon the recognizance.”³

§ 124. **Second Admittance to Bail.** — When any person charged with a criminal offense is surrendered by his sureties, he may be again admitted to bail in the same manner as if committed for not finding sureties to recognize for him.⁴

§ 125. **When Bail to be Exonerated on Default made.** — “If by the act of God, bail are unable without their fault to surren

¹ R. S., 397, § 307.

² A surrender to the magistrate before whom the examination was had will not discharge the sureties, for the statute requires the surrender to be made to the sheriff. *Stegars v. State*, 2 Blackf., 104. Payment of the costs is an indispensable prerequisite to the discharge. *Cleveland v. Skinner*, 56 Ills., 501.

³ R. S., 397, § 308.

⁴ Id., § 309.

der their principal, they shall, on motion, before final judgment on the *scire facias*, be exonerated and be discharged by the court, with or without costs, as the court deem equitable.”¹

§ 126. **Witnesses to Recognize.** — “When the prisoner is admitted to bail or committed, the judge or justice of the peace shall bind, by recognizance, such witnesses against the prisoner as he deems material, to appear and testify at the next court having cognizance of the offense, and in which the prisoner shall be held to answer: *Provided*, no such witness shall be required to give other security than his own recognizance for such appearance.”²

§ 127. **Married Women and Minors.** — “When a married woman or a minor is a material witness, any other person may be allowed to recognize for the appearance of such witness; or the judge or justice of the peace may, in his discretion, take recognizance of such married woman or minor, in a sum not exceeding fifty dollars, which shall be valid and binding in law, notwithstanding the coverture or minority: *Provided*, that no such minor or married woman shall be required to give other security than his or her own recognizance for such appearance.”³

FORM OF RECOGNIZANCE OF WITNESS.

State of Illinois, }
 _____ County. } ss.

Be it remembered that on the — day of —, A. D. 18—, E. F., of — in the said county, personally came before L. M., a justice of the peace in and for said county, and acknowledged himself to owe and be indebted to the People of the State of Illinois in the sum of — dollars, to be made and levied of his goods and chattels, lands and tenements, if default shall be made in the condition following:

The condition of this recognizance is such that if the said E. F. shall personally be and appear at the circuit court on the first day of the next term thereof, to be held at the court-house in the town of (or “village” or “city”) in said county of —, on the — day of —, A. D. 18—, at the opening of the court on that day, and from day to day and from term to term, and from day to day of each term, to testify in the case of the People against C. D., charged with the offense of (insert name of the offense or statement

¹ R. S., 398, § 312.

² R. S., 403, § 364.

³ Id., § 365.

of the offense as in the complaint) as well to the grand jury as to the petit jury, and not depart without leave, then this recognizance to be void—otherwise to remain in full force and effect.

E. F.

Taken, subscribed and acknowledged }
before and approved by me, on the day }
and year first above written.

L. M., J. P.

FORM OF RECOGNIZANCE OF SEVERAL WITNESSES.

State of Illinois, } ss.
——— County. }

Be it remembered that on the — day of —, A. D. 18—, E. F., G. H., and I. J., all of the county aforesaid, personally came before L. M., a justice of the peace of the said county, and each of them respectively and separately acknowledged himself severally and individually to owe the People of the State of Illinois the sum of — dollars, to be made and levied of his goods and chattels, lands and tenements, if default shall be made in the condition following:

The condition of this recognizance is such that if the said E. F., G. H., and I. J. shall severally and personally appear at the circuit court on the first day of the next term thereof, to be held at the court-house in the town (or “village” or “city”) in said county of — on the — day of —, A. D. 18—, at the opening of the court on that day, and from day to day and from term to term, and from day to day of each term, to testify in the case of the People against C. D., charged with the offense of (*insert name of the offense or a statement of the offense as in the complaint*), as well to the grand jury as the petit jury, and not depart without leave, then this recognizance to be void—otherwise to remain in full force and effect.

E. F.

G. H.

I. J.

Taken, subscribed and acknowledged }
before, and approved by me, on the day }
and year first above written.

L. M., J. P.

§ 128. Commitment of Witness. — “Witnesses required to recognize shall, if they refuse, be committed to jail by the judge or justice, there to remain until they comply with such order, or are otherwise discharged according to law.”¹

§ 129. *Mittimus*. — “When an offender or witness is committed because he fails to enter into recognizance as required by

¹ R. S., 403, § 366.

law, or because the offense is not bailable, the judge or justice of the peace shall make out a warrant of commitment, directed to the sheriff, coroner or any constable, and containing a short recital of the cause of the commitment, and commanding the officer to commit the prisoner to the county jail, and deliver him to the keeper thereof, and the jailer to receive him into his custody, and safely keep him until he is discharged by process of law. No mittimus shall be considered defective for the want of the seal of the judge or justice, or other legal or technical form, if sufficient appear on its face to ascertain for what crime or offense the prisoner is committed.”¹

FORM OF COMMITMENT OF PRISONER.

State of Illinois, { ss.
 _____ County. }

The People of the State of Illinois to the Sheriff, Coroner, or any Constable of the said County,² Greeting:

Whereas, A. B. lately made complaint to L. M., a justice of the peace of the said county, and the said justice examined on oath the said complainant and E. F., a witness produced by him, and reduced the complaint to writing and caused it to be subscribed and sworn to by the said complainant, whereby it was charged that the said C. D. did (*insert statement of the offense³ as in the complaint*) and from the said complaint it appeared that such offense had been committed, and that there was probable cause for believing that the said C. D. had committed the same, whereupon the said justice issued a warrant for his arrest, and the said C. D. has since been arrested thereon and brought before the said justice, and the said justice then and there examined the witnesses on the part of the prosecution, as well as those produced on behalf of the said C. D., on oath in the presence of the said C. D., in relation to each and every matter connected with such charge which the said justice deemed pertinent, and from the said examination in the presence of the said C. D. it appeared to the said justice that the said offense had been committed, and that there was probable cause to believe the said C. D. guilty thereof; and the said C. D. not having offered sufficient bail for his appearance at the circuit court to answer for the said offense,—

¹ R. S., 403, § 367.

² The statute does not require the mittimus to be directed to the keeper of the jail, and it is unnecessary, for the reason that it is directed to the sheriff who is *ex-officio* keeper of the jail. R. S., 616, § 2.

³ The same technical accuracy in stating the offense is not required in a mittimus as in an indictment. *Young v. People*, 18 Ills., 56.

We therefore command you to commit the said C. D. to the county jail of the said county, and deliver him to the keeper thereof, and the jailor to receive the said C. D. into his custody and safely keep him until he is discharged by process of law.

Given under my hand this — day of —, A. D. 18—.

L. M., J. P.

FORM OF INDORSEMENT ON COMMITMENT.

The crime was proved before me, E. F., residing in the town of —, county of —, and State of Illinois, and G. H., residing in, &c. Bail ought to be taken in the sum of \$—.

FORM OF COMMITMENT OF WITNESS.

State of Illinois, }
 ——— County. } ss.

The People of the State of Illinois to the Sheriff, Coroner or any Constable of the said County, Greeting:—

Whereas, on the examination of E. F., this day taken on oath before L. M., a justice of the peace of said county, it appears that he is a material witness for the People against C. D. on a charge made against him in a complaint to the said justice, subscribed and sworn to by A. B., stating that C. D. did (*insert statement of the offense as in the complaint*), on which the said C. D. has been arrested and brought before the said justice and by him admitted to bail (*or "committed to the jail of the said county"*); and, whereas, the said E. F., on being ordered by the said justice to enter into a recognizance, conditioned according to law, for his appearance at the circuit court, to testify in the case of the People against the said C. D. for the said offense, did refuse, and doth still refuse, to enter into the said recognizance,—

We therefore command you to commit the said C. D. to the county jail of the said county, and the jailer to receive the said C. D. into his custody and safely keep him, there to remain until he complies with such order or is otherwise discharged according to law.

Given under my hand this — day of —, A. D. 18—.

L. M., J. P.

§ 130. Amount of Bail to be Indorsed on Mittimus. — “If the offense is bailable, or the person committed is a witness, the judge or justice of the peace shall indorse on the warrant of commitment the amount of bail required.”¹

§ 131. Names of Witnesses to be Indorsed on Mittimus. — “The

¹ R. S., 403, § 368. It is not essential to the validity of the mittimus issued by a committing magistrate in a bailable case that he should indorse upon it the sum in which bail ought to be taken if such sum appears in the body of the mittimus. *Bulson v. People*, 31 Ills., 409.

judge or justice of the peace committing any person upon a criminal charge shall indorse upon the warrant of commitment the names and residences of the principal witnesses by whom the crime was proved before him.”¹

§ 132. **Mittimus to be Delivered to the Jailer.** — “The officer delivering the prisoner to the custody of the jailer shall also deliver to him such warrant of commitment, to be by him duly preserved.”²

§ 133. **Names of Witnesses Indorsed on Copy of Mittimus.** — “Whenever any prisoner, in the custody of the sheriff of any county, on any warrant of commitment as aforesaid, shall, by himself or his attorney demand of such sheriff a copy of said warrant of commitment, said sheriff shall indorse on the said copy the names of the witnesses written thereon as aforesaid, and deliver the same to the prisoner or his counsel; and any justice or judge who shall neglect to write the name or names of the witnesses aforesaid on the warrant of commitment, or any sheriff who, on such demand, shall neglect to indorse the name of the said witness or witnesses on any copy of said commitment, or deliver the same to the prisoner or his counsel, each justice, judge or sheriff offending in the premises shall be fined in the sum of twenty dollars, to be recovered by action of debt, in the name of and for the use of any person who shall sue for the same in any court of record.”³

§ 134. **Recognizance of a Prisoner in Vacation.** — “Where any person shall be committed to jail on a criminal charge for want of good and sufficient bail (except for treason, murder, or other offense punishable with death) or for not entering into a recognizance to appear and testify, any judge or any two justices of the peace may take such bail or recognizance in vacation, and may discharge such prisoner from his imprisonment.”⁴

¹ R. S., 403, § 369.

² Id., § 370.

³ R. S., 403, § 371.

⁴ Id., 396, § 299.

WARRANT TO DISCHARGE PRISONER AFTER COMMITMENT.

State of Illinois, }
 ——— County. } ss.

The People of the State of Illinois to the Keeper of the Common Jail of said County:

You are hereby commanded to discharge from imprisonment C. D. if detained in your custody for no other cause than what is mentioned in the warrant for his commitment under the hand of L. M., a justice of the peace of said county, dated the — day of —, A. D. 18—.

Given under the hands of L. M. and A. E., two justices of the peace of said county, this — day of —, A. D. 18

L. M., J. P.

A. E., J. P.

(or "G. H., County [or "Circuit"] Judge.")

SECTION III.

SEARCH WARRANT.

§ 135. Complaint—Search Warrant for Stolen Goods.

136. For other Property.

137. Provisions of the Constitution—Requisites of the Complaint and Warrant.

138. The Place to be Searched, how Described in the Warrant.

139. Warrant to Search in the Day-time.

140. Warrant to Search in the Night-time.

141. In What Cases a Search Warrant may Issue.

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149. Searching for Dangerous Weapons.

150. Evidence.

151. Search Warrant may Issue for Records.

152. Execution of the Process.

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§ 135. Complaint — Search Warrant for Stolen Goods. — The statute provides that "when complaint is made in writing,

verified by affidavit, to any judge or justice of the peace, that personal property (particularly describing the same) has been stolen, embezzled, or fraudulently obtained by false tokens or pretenses, and that the complainant believes it is concealed in any house or place (particularly describing the same), the judge or justice of the peace, if he is satisfied that there is reasonable cause for such belief, shall issue a warrant to search such house or place for such property.”¹

§ 136. **For Other Property.** — “Any such judge or justice of the peace may, on the like complaint, made on oath, issue search warrants when satisfied that there is reasonable cause, in the following cases, to wit.:

1. To search for and seize counterfeit or spurious coin, forged bank notes and other forged instruments, or tools, machinery or materials prepared or provided for making either of them.

2. To search for and seize books, pamphlets, ballads, printed papers, or other things containing obscene language, or obscene prints, pictures, figures or other descriptions, manifestly tending to corrupt the morals of youth, and intended to be sold, loaned, circulated or distributed, or to be introduced into any family, school or place of education.

3. To search for and seize lottery tickets, or materials for a lottery, unlawfully made, provided or procured, for the purpose of drawing a lottery.

4. To search for and seize gaming apparatus, or implements used, or kept and provided to be used, in unlawful gaming, in any gaming-house or in any building, apartment or place restored to for the purpose of unlawful gaming.”²

§ 137. **Provisions of the Constitution — Requisites of the Complaint and Warrant.** — The Constitution provides that the right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures shall not be violated, and no warrant shall issue without probable cause supported by affidavit, particularly describing the place to be

¹ R. S., 404, § 372.

² Id., § 373.

searched and the persons or things to be seized.¹ An amendment of the Constitution of the United States contains substantially the same provision.² It has been held that a provision of the statute allowing search for and seizure of lottery tickets and materials for a lottery was not unconstitutional, because an unreasonable search or seizure.³ The place must be particularly designated, and the property particularly described in both the complaint⁴ and warrant.⁵ If the search warrant and the complaint are on the same paper, and the things to be searched for are properly designated and described in the complaint, and the warrant directs the officer to search for the things mentioned in the above complaint, the process is legal without any further description of the things in the warrant.⁶ If the goods are described in general terms as goods, wares and merchandise, without any specification of their character, quality, number or weight, or any other circumstances tending to distinguish them, it is not such a particular description as the statute and Constitution require.⁷ The description "three cases of misses' and women's boots of the value of one hundred dollars, a lot of oak-tanned soles of the value of fifty dollars, and ten sides of sole leather of the value of forty dollars" was held to be sufficient.⁸

§ 138. **The Place to be Searched, how Described in the Warrant.**—A general warrant to search all suspected places is illegal and void,⁹ and even the officer acting under color of its author-

¹ R. S., 59, Con. of Ills., Art. II., § 6; *Ashley v. Peterson*, 25 Wis., 621.

² R. S., 16, Amend. Con. of U. S., Art. IV.

³ *Com. v. Dana*, 2 Met., 329; see also *Allen v. Staples*, 6 Gray, 491; *State v. Miller*, 48 Me., 576.

⁴ R. S., Con. Ills., Art. II., § 6.

⁵ R. S., 16, Amend. of Con. of U. S., Art. IV; R. S., 404, § 375; *People v. Holcomb*, 3 Park. Cr. R., 656; *Reed v. Rice*, 2 J. J. Marsh, 44; *Ashley v. Peterson*, 25 Wis., 621.

⁶ *Com. v. Dana*, 2 Met., 329; *Dwinnells v. Boynton*, 3 Allen, 310.

⁷ *Sanford v. Nichols*, 13 Mass., 286.

⁸ *Dwinnells v. Boynton*, 3 Allen, 310; see also *State v. Robinson*, 33 Me., 564.

⁹ 4 Black. Com., 238; 1 Bish. Cr. P., § 203; 10 State Tr., 426; *Ashley v. Peterson*, 25 Wis., 621.

ity will not be justified in executing it.¹ If a building is to be searched, the name of the owner or occupant must be given,² or if not occupied it should be particularly described, so that the officer will be left to no discretion in respect to the place, and a misdescription in regard to the ownership³ or description so general that it applies equally to several buildings or places, would render a warrant void in law;⁴ therefore a warrant to search "the houses and buildings of Hiram Ide and Henry Ide,"⁵ or "the suspected place," is too general, and void.⁶ A warrant to search the dwelling-house of a person authorizes the officer to search only the house which he occupies,⁷ and does not authorize him to search his barn⁸ nor a dwelling-house occupied by another owned by him.⁹ If the house be described as the house of a company, such description will not authorize the searching of the house of an individual member of the company.¹⁰ But a search warrant may properly direct the officer to search not only the principal dwelling, but also other buildings and places of concealment, such as a granary, out-buildings and straw-stacks on the same premises.¹¹ It is sufficient if the warrant describes the place as near as may be.¹² But the description of the place to be searched should be as certain in a warrant as would be necessary in a deed to convey such place.¹³

¹ Barb. Cr. L., 500; 1 Arch. C. P. & Pl., 144.

² Stone v. Dana, 5 Met., 98.

³ Sanford v. Nichols, 13 Mass., 286; Allen v. Staples, 6 Gray, 491.

⁴ Cooley Const. L., 304.

⁵ Humes v. Taybor, 1 R. I., 464.

⁶ People v. Holcomb, 3 Park. Cr. R., 556.

⁷ 1 Bish. Cr. P., § 209.

⁸ Jones v. Fletcher, 41 Me., 254.

⁹ McGhinchy v. Barrous, 41 Me., 74.

¹⁰ Sanford v. Nichols, 13 Mass., 286.

¹¹ Meek v. Pierce, 19 Wis., 300; see Dwinnells v. Boynton, 3 Allen, 310; State v. Robinson, 33 Me., 564.

¹² Santo v. State, 2 Iowa, 165.

¹³ Jones v. Fletcher, 41 Me., 254.

FORM OF COMPLAINT FOR A SEARCH WARRANT FOR STOLEN GOODS.

State of Illinois, }
 ——— County. } ss.

A. B. makes complaint to L. M., a justice of the peace of the said county, and says that on the — day of —, A. D. 18—, at the town of — in the said county, three pairs of shoes (*or particularly describe the things to be seized*) of the value of ten dollars, of the goods and chattels of the said A. B., were feloniously stolen, taken and carried away by some person or persons unknown (*or “and there is probable cause¹ to believe that C. D. feloniously stole, took, and carried away the same”*) and this complainant verily believes² that the said stolen goods and chattels are concealed in the dwelling-house of (*the said*) C. D. (*or describe particularly the place to be searched*) in the town of — in said county, and that the following are the reasons for the said belief (*insert the reasons for the belief according to the circumstances*).

Wherefore he prays that a search warrant may issue according to law.

A. B.

State of Illinois, }
 ——— County. } ss.

A. B., being duly sworn³ on his oath, says that the above complaint is true in substance and matter of fact.

A. B.

Subscribed and sworn to before me, }
 this — day of —, A. D. 18—. }
 L. M., J. P.

FORM OF COMPLAINT FOR A WARRANT TO SEARCH FOR COUNTERFEIT COIN.

State of Illinois, }
 ——— County. } ss.

A. B. complains to L. M., a justice of the peace of the said county, and being duly sworn on his oath, says that on the — day of —, A. D. 18—, at the town of — in the county aforesaid, three pieces of silver coin (*or*

¹ The statute relating to search warrants does not require the person to be seized to be named or described. R. S., §§ 372, 374. But the Constitution and another statute prohibits the issuing of a warrant for his arrest without such description and an affidavit showing probable cause. R. S., 59, Con. Ills., Art. II., § 6; R. S., 401, §§ 348, 349.

² Where the words used were “has cause to suspect and does suspect” instead of the words “verily believes,” the complaint was held to be insufficient. *Humes v. Taybor*, 1 R. I., 464.

³ The complaint must be verified by affidavit or the warrant will be void. R. S., 404, § 372; *State v. Carter*, 39 Me., 262; *Jones v. Fletcher*, 41 Me., 254; *State v. Staples*, 37 Me., 228; *Saunders v. State*, 2 Iowa, 230. According to the statute, a complaint under the 373d section must be on oath. R. S., 404, § 373. But in order to comply with the Constitution it must also be reduced to writing, and put in the form of an affidavit. R. S., 59, Con. Ills., Art. II., § 6.

particularly describe the thing to be seized) then current by usage in this state of Illinois, called Spanish milled dollars, were unlawfully and fraudulently counterfeited with intent to defraud some person, body politic or corporate, by some person or persons unknown, or, and there is probable cause to believe, the said C. D. did unlawfully and fraudulently counterfeit the same with intent to defraud some person, body politic or corporate; and this complainant verily believes that the said counterfeit coin is concealed in the dwelling-house of *(the said) C. D. (or describe particularly the place to be searched)*, in the town of — in the said county, and that the following are the reasons for the said belief *(insert the reasons for the belief according to the circumstances)*.

Wherefore he prays that a search warrant may issue according to law.

A. B.

Subscribed and sworn to before me, }
this — day of —, A. D. 18—. }

L. M., J. P.

§ 139. Warrant to Search in Day-time. — “All such warrants shall be directed to the sheriff or any constable of the county, commanding such officer to search in the day-time the house or place where the stolen property or other things for which he is required to search are believed to be concealed, (which place and property, or things to be searched for, shall be particularly designated and described in the warrant), and to bring such stolen property or things, when found, and the person in whose possession they are found, to the judge or justice of the peace who issued the warrant, or to some other judge or justice of the peace or court having cognizance of the case.”¹

FORM OF SEARCH WARRANT.

State of Illinois, }
—— County. } ss.

The People of the State of Illinois to the Sheriff or any Constable of the said county, Greeting:

Whereas, a complaint was this day made in writing, verified by the affidavit of A. B. to the undersigned, a justice of the peace of the said county, stating *(insert statement of the offense as in the complaint)*, and from the said complaint the undersigned, being satisfied that there is reasonable cause for such belief,—

We therefore command you to search in the day-time the said dwelling.

¹ R. S., 404, § 374.

house of the said C. D.¹ (*or particularly describe the place to be searched*), situate in the said town of —, in the county aforesaid. and to bring the said three pairs of shoes,² the property of the said A. B. described herein, when found, and (*the said C. D., if the said property shall be found in his possession or*) the person or persons in whose possession they are found³ to the undersigned, or to some other judge or justice of the peace or court having cognizance of the case.

Given under my hand and seal this — day of —, A. D. 18—.

L. M., J. P. [SEAL.⁴]

§ 140. **Warrant to Search in the Night-time.** — “If there is satisfactory evidence that any property stolen, embezzled, or obtained by false tokens or pretenses, or that any of the other things for which a search warrant may be issued by the provisions of this act are kept concealed, prepared or used in a particular house or place, a warrant may be issued by two judges or justices of the peace, to authorize the search of such house or place in the night-time, and to bring the property or things described in the warrant or summons, and the person in whose possession they are found, before either of the judges or justices who issued the warrant, or some other judge or justice of the peace of the county.”⁵

¹ In the State of Indiana a warrant to search the premises of B. P. Tuell, was held not to authorize the officer to search the dwelling of Benjamin P. Tuell. *Tuell v. Wrink*, 6 Blackf., 249. But in this state the court would probably hold otherwise. *Vance v. Funk*, 2 Scam., 263; *Pickering v. Pulsifer*, 4 Gilm., 83; *Dwinnells v. Boynton*, 3 Allen, 310; *State v. Robinson*, 33 Me., 564.

² The omission of the command to bring the property to the magistrate is a fatal objection to the warrant. *Cooley Const. L.*, 305; *Fisher v. McGuire*, 1 Gray, 1; *Hubbard v. People*, 4 Mich., 208; *People v. Holcomb* 3 Park. Cr. R., 656.

³ Words equivalent to the words “person or persons in whose possession they are found,” in New York, were held to be a sufficient description of the person to be seized. *Bell v. Clapp*, 10 John., 265. But whether they are sufficient under our constitution does not seem clear. *R. S.*, 59, Con. Art. II., § 6; *R. S.*, 401, § 348.

⁴ Search warrants must be under seal. 1 *Bish. Cr. P.*, § 243; *People v. Holcomb*, 3 Park. Cr. R., 656.

⁵ *R. S.*, 404, § 375.

FORM OF A WARRANT TO SEARCH IN THE NIGHT-TIME.

State of Illinois, }
 ——— County. } ss.

The People of the State of Illinois to the Sheriff or any Constable of the said County, Greeting:

Whereas, a complaint was this day made in writing, verified by the affidavit of A. B., to the undersigned justices of the peace of the said county, stating (*insert statement of the offense as in the complaint*), and from the evidence in the said complaint and the examination of A. B. and E. F., on oath before us the undersigned, being satisfied that the said property is concealed in the said dwelling-house of the said C. D., situate in the said town of — in the county aforesaid,—

We therefore command you to search in the night-time the said dwelling-house of the said C. D. (*or particularly describe the place to be searched*), and to bring the said three pairs of shoes, the property of the said A. B., described herein, when found, and (*the said C. D., if the said property shall be found in his possession or*) the person or persons in whose possession they are found, before either of the undersigned or some other judge or justice of the peace of the county.

Given under our hands and seals this — day of —, A. D. 18—.

L. M., J. P. [SEAL.]

A. E., J. P. [SEAL.]

§ 141. In what Cases a Search Warrant may Issue. — A search warrant cannot be issued except in the cases specified by statute,¹ and can never be availed of by an individual in the course of a civil proceeding or for the maintenance of a private right; but its use is confined to public prosecutions instituted and pursued for the suppression of crime and the detection and punishment of criminals.² A search warrant for libels or other papers of a suspected party is illegal.³ If a magistrate grants a search warrant groundlessly and maliciously, without such probable cause as might induce a candid and impartial man to suspect the party to be guilty, he will be liable to an action at the suit of the party aggrieved.⁴ It seems that case will lie if the party has no grounds for his

¹ 1 Nun. & Walsh, 250; Cooley Const. L., 304, 307.

² Robinson v. Richardson, 13 Gray, 456; Entick v. Carrington, 19 St. Tr., 1029, 1067.

³ 1 Chitty Cr. L., 65; 11 St. Tr., 313, 321.

⁴ Barb. Cr. L., 500; 1 Bish. Cr. P., § 203.

proceedings and is actuated by malicious motives;¹ but trespass will not lie against a person who has procured,² or an officer³ who has executed, a search warrant for stolen goods if the warrant be duly issued and regularly executed.

§ 142. **How Executed.** — Every such warrant must be executed by a public officer, and not by a private citizen,⁴ though it is proper that the complainant should be present and assist, because he knows and may identify the goods.⁵ A constable may serve a warrant which was issued upon the complaint of himself and another person.⁶ If the warrant does not expressly authorize a search in the night, it must be done in the day-time, between sunrise and sunset.⁷

§ 143. **Forcible Entrance.** — “The officer may break open any outer or inner door⁸ or window of a house, or anything therein, if, after notice of his authority and purpose, he is refused admittance, using no more force than is necessary.”⁹ No precise form of words is required to be used in giving the notice. It is sufficient if the party is informed by the officer of his business and apprized that he does not come as a trespasser, but claims to act under proper authority.¹⁰ The notice of authority and demand of admittance is only necessary when there is some person present to whom it may be given or of whom it can be made.¹¹ The officer may break into boxes after the keys have been demanded and refused.¹²

¹ 1 Arch. C. P. & Pl., 146; *Beatty v. Perkins*, 6 Wen., 382; *Plummer v. Dennett*, 6 Greenl., 421; *Luddington v. Peck*, 2 Conn., 700; *Bill v. Clapp*, 10 John., 263; *Hayden v. Shed*, 11 Mass., 500; *Morris v. Scott*, 21 Wen., 281.

² *Beatty v. Perkins*, 6 Wen., 382.

³ *Barnard v. Bartlett*, 10 Cush., 501.

⁴ R. S., 404, § 374; 1 Chitty Cr. L., 65; *Cooley Const. L.*, 305.

⁵ 1 Arch. C. P. & Pl., 145; *Smythe*, 235; *Barb. Cr. L.*, 500; *Entick v. Carrington*, 11 St. Tr., 313, 321; 2 Wills, 275.

⁶ 1 Bish. Cr. P., § 242; *Com. v. Certain Intoxicating Liquors*, 6 Allen, 596.

⁷ *Crock. on S. & C.*, § 80.

⁸ 2 Hale P. C., 151; 1 Bish. Cr. P., § 203, 208; *Barb. Cr. L.*, 500; 3 Bos. & Pul., 258; 6 B. & Cres., 332; *Banks v. Farwell*, 21 Pick., 156.

⁹ R. S., 404, § 376.

¹⁰ *Barb. Cr. L.*, 501, 502.

¹¹ *Androscoggin Railroad v. Richards*, 41 Me., 233.

¹² 1 Bish. Cr. P., 208; 2 Hale P. C., 157; 3 Bos. & Pul., 258; *Banks v. Farwell*, 21 Pick., 156.

§ 144. **Officer, when Protected in Executing the Warrant.** — In executing the warrant, if the officer searches any other place,¹ or seizes any other goods,² than such as are described in the warrant, he will be a trespasser unless the goods not specified in the warrant are likely to furnish evidence of the identity of the articles stolen or of the guilt of the prisoner.³ Where, therefore, a warrant was granted to seize stolen sugar, and the officer seized tea, he was held to have exceeded his authority and to be liable to the party aggrieved for a trespass.⁴ But if he seizes goods which correspond with and come within the description of those stolen, he will be justified in taking them, though they do not prove to be the goods lost by the complainant.⁵ If the officer pursues strictly the directions of the warrant, he will be justified though the goods are not found in the place directed to be searched,⁶ nor will it make any difference if the warrant was improperly granted if it be regularly granted and regular in form.⁷

§ 145. **Return.** — “The return of the officer shall particularly specify the property taken, and the place where and the person from whom the property is taken.”⁸

FORM OF A RETURN TO A SEARCH WARRANT.

State of Illinois, }
 ——— County. } ss.

In obedience to the within writ I did on the ——— day of ———, A. D. 18—, enter the premises therein described, and make search for the goods and chattels therein set forth, and there found of the said goods and chattels the

¹ Nun. & Walsh, 258; 1 Bish. Cr. P., 209; McGhinchey v. Barrows, 41 Me., 74.

² Barb. Cr. L., 500; Cooley Const. Lim., 304; Sanford v. Nichols, 13 Mass., 286.

³ Crozier v. Cundy, 9 D. & Ry., 224; 6 B. & Cres., 333.

⁴ Crozier v. Cundy, 9 D. & Ry., 224; 6 B. & Cres., 332; State v. Brennan's Liquors, 25 Conn., 278.

⁵ Crock. on S. & C., 80; Stone v. Dana, 5 Met., 98.

⁶ Cooley Const. L., 307; 1 Bish. Cr. P., §§ 203, 208; Barnard v. Bartlett, 10 Cush., 501.

⁷ Bell v. Clapp, 10 John., 273; Sanford v. Nichols, 13 Mass., 236; Grumon v. Raymond, 1 Conn., 40; State v. Mann, 5 Ired., 45, *ante* § 46.

⁸ R. S., 405, § 377.

following-named articles: three pairs of shoes (*or insert a list of the articles found*), and took the same from the dwelling-house of C. D., situate in the town of — in said county, from the said C. D., and have them now in court (*and did also arrest the said C. D. in whose possession the said property was found, and have him now in custody here in court*), as commanded, this — day of —, A. D. 18—.

J. S., Const. of — Co., Ills.

§ 146. **Disposal of Property.** — “When an officer, in the execution of a search warrant, finds stolen or embezzled property, or seizes any of the other things for which a search is allowed by this act, all the property and things so seized shall be safely kept by the direction of the judge, justice or court, so long as necessary for the purpose of being produced or used as evidence on any trial. As soon as may be afterwards all such stolen and embezzled property shall be restored to the owner thereof, and all the other things seized by virtue of such warrants shall be burnt, or otherwise destroyed, under the direction of the judge, justice or court.”¹

§ 147. **Costs Against Complainant.** — “If, on the hearing, it appears that there was no probable cause for suing out the warrant, the whole cost may be taxed against the complainant, and execution awarded.”²

§ 148. **Searching Prisoners.** — An officer has no right to search a prisoner unless he has a warrant authorizing him to make the search.³ The practice of taking from those arrested every thing they have, ought not to be continued.⁴ Yet, on the proper complaint being made, the prisoner may be searched in the cases specified by statute.⁵ Every thing taken from

¹ R. S., 405, § 378. A statute authorizing a condemnation or other final disposition of property, without notice to the owner and an opportunity for a hearing afforded him, has been held to conflict with the Constitution, and therefore to be void. *Cooley Const. Lim.*, 305; *Fisher v. McGirr*, 1 Gray, 1; *Hibbard v. People*, 4 Mich., 126; and see *Gear v. Bullerick*, 34 Ills., 75.

² R. S., 405, § 379.

³ R. S., 59, Con. of Ills., Art. II., § 6.

⁴ 1 Bish. Cr. P., §§ 210–212; 1 Hays Dig., 70; *Reg. v. McKay*, 3 Crawf. & Dix. C. C., 205; *Rex v. Jones*, 6 Car. & P., 343; *Rex v. Donnell*, 7 Car. & P., 138.

⁵ R. S., 404, §§ 372–380; *Houghton v. Bachman*, 47 Barb., 388.

the prisoner not furnishing any evidence of his guilt, the magistrate or court, on motion founded upon affidavit showing the facts, should order restored to him.¹

§ 149. **Searching for Dangerous Weapons.** — The statute provides that “when a person charged with a felony is suspected by the judge or justice of the peace before whom he is brought to have upon his person a dangerous weapon, or anything which may be used as evidence of the commission of the offense, the judge or justice may direct him to be searched in his presence, and such weapon or other thing to be retained, subject to the order of the court in which the defendant may be tried.”²

§ 150. **Evidence.** — The constitution of this state and of the United States provide that “the right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures shall not be violated.”³ It has been believed that under this provision the seizure of one’s papers on a search warrant, in order to obtain evidence against him, is clearly forbidden.⁴ Lord Camden said, “To enter a man’s house by virtue of a nameless warrant, in order to procure evidence, is worse than the Spanish Inquisition—a law under which no Englishman would wish to live an hour.”⁵ But it has been held that evidence obtained by means of a search warrant is not inadmissible, either upon the ground that it is in the nature of admissions made under duress, or that it is evidence which the defendant has been compelled to furnish against himself, or on the ground that the evidence has been unfairly or illegally obtained, even if the search warrant was illegally issued.⁶

§ 151. **Search Warrant may Issue for Records.** — “If any per-

¹ 1 Arch. C. P. & Pl., 134, 146, 573; 1 Bish. Cr. P., § 212; *Rex v. Kinsey*, 7 Car. & P., 447; *Rex v. Barnett*, 3 Car. & P., 600; 4 Wash. C. C. Rep., 710.

² R. S., 405, § 380.

³ Con. Ills., Art. II., § 6; Amend. Con. of U. S., Art. IV.

⁴ Cooley Const. Lim., 305, 306, n. 5.

⁵ *Entick v. Carrington*, 19 St. Tr., 1029; S. C., 2 Wills, 275; *Huckle v. Money*, 2 Wills, 205; *Robinson v. Richardson*, 13 Gray, 456.

⁶ 1 Bish. Cr. P., § 246; *State v. Flynn*, 36 N. H., 64.

son whose office shall be abolished by law, vacated or determined by removal from office, resignation, death, expiration of the time for which he was elected or appointed, or other cause; or his executors, administrators, or other persons, neglect or refuse to deliver over any records, papers, documents or other writing, or other articles of property pertaining to such office, when thereto lawfully required by the successor to such office, or other person entitled to the custody thereof,—the judge of any court of record in the proper county may, upon the affidavit of any competent person, setting forth proper facts, issue his warrant, directed to the sheriff or coroner of the proper county, commanding him to seize all the records, books, papers, documents and other public property belonging or appertaining to the said office, and deliver the same to the person entitled to the custody thereof, to be named in such warrant.”¹

§ 152. *Execution of the Process.* — “The officer executing any warrant issued as aforesaid may break open any doors, trunks or places in which any of the records, books, papers, documents or other public property in such warrant commanded to be seized and secured, may be concealed, or in which he may suspect them to be; and, in case of resistance, may arrest any person who may resist the execution of such warrant, and carry him before some judge or justice of the peace, to be dealt with as other persons obstructing the execution of such process; and the officer executing such warrant may call to his assistance the power of the county in the same manner as in the execution of such process. Any officer to whom any such warrant may be directed and delivered, who shall neglect or refuse to execute and return the same according to law, or otherwise fail to perform any of the duties herein required of him, shall forfeit and pay a sum not exceeding one thousand dollars, nor less than one hundred dollars, to be recovered by indictment, to the use of the county in any court of competent jurisdiction.”²

¹ R. S., 384, § 217.

² Id., 385, § 218.

§ 153. **Defense.** — “Whoever is aggrieved by the issuing of such warrant may apply to such judge, or, if he is absent, to any other judge of a court of record, who, if he is satisfied, upon the affidavit of the applicant, that there is good reason to believe injustice has been, or is about to be, done by the execution of such warrant, shall issue a citation to all persons interested therein, commanding them to appear before such judge at a place and time to be in such citation named, which shall be executed by the sheriff or coroner. And the judge shall have the power to enforce obedience to such citation by attachment to be issued by him, and to proceed in a summary way and determine according to right and justice, and may issue his warrant for the restoration of any book, record, paper, document, or other article of property, which shall appear to him to have been improperly seized or delivered over; which warrant shall be executed in the same manner, and the officer to whom it is directed shall have the same powers, and be liable to the same penalties for neglect of duty, as in case of other warrants. Any proceeding under this and the two preceding sections shall not be held to determine the right of any person to such office, but such right may be contested in the manner provided by law.”¹

¹ R. S., 385, § 219.

CHAP. III.

PROCEEDINGS IN CASES WHICH MAY BE TRIED BEFORE JUSTICES
OF THE PEACE.I. GENERAL PROVISIONS RELATING TO THE JURISDICTION ARREST,
TRIAL, EXECUTION AND APPEAL.

II. ASSAULT AND BATTERY.

III. MISCELLANEOUS OFFENSES WHICH MAY BE TRIED BEFORE A JUSTICE
OF THE PEACE.

1. Affrays.
2. Unlawful Assembly.
3. Refusing to Join Posse.
4. Keeping open Tippling Houses on Sunday.
5. Disturbing the Peace of Society on Sunday.
6. Disturbing a Family on Sunday.
7. Disturbing the Peace.
8. Lewdness, Exposure of Person and other Acts of Indecency.
9. Disorderly House.
10. Disturbing Meetings.
11. Gaming.
12. Barratry.
13. Maintenance.
14. Compounding Crime.
15. Assuming a Corporate Name.
16. Refusing to Allow Prisoner to See Counsel.
17. Omitting to Label or Keep Record of Poisonous Drugs Sold or Given Away.
18. Drunkenness.
19. Officer not Trying to Prevent Duel.
20. Officer Neglecting to Suppress an Unlawful Assembly of Twelve or more Persons.
21. Illegal Fees.
22. Intimidation of Workmen.
23. Advertising Lotteries.
24. Vagabonds.
25. Selling Liquor without License.

IV. OFFENSES AGAINST PROPERTY WHICH MAY BE TRIED BEFORE A JUSTICE
OF THE PEACE.

1. Canada Thistles.
2. Failing to Protect Castor Beans.

3. Cruelty to Animals.
4. Unnecessarily Frightening Team by Engineer.
5. Injuring or Destroying Baggage.
6. Defacing, Tearing down, etc., of Advertisements,
Legal Notices, etc.
7. Failing to Protect Saltpeter Caves.
8. Bringing Animals into the State, Infected, etc.
9. Trespass.
10. Setting Fire to Woods, Prairies and other Grounds.
11. Counterfeiting Trade-Marks.
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V. NUISANCES.

1. General Provisions.
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SECTION I.

GENERAL PROVISIONS RELATING TO THE JURISDICTION, ARREST, TRIAL, EXECUTION AND APPEAL.

§ 154. Jurisdiction.

155. Arrest and Trial.

156. Special Constable.

157. Witness—Change of Venue—Continuances—Oaths—Depositions.

158. Jury Trial.

159. Jury to Determine the Penalty.

160. Judgment on Verdict Rendered.

161. Execution to Issue.

162. Capias Issued.

163. Appeals.

164. Duty of Justices on Appeal.

165. Defendant Guilty—Judgment Rendered.

§ 154. Jurisdiction. — “Justices of the peace shall have original jurisdiction in all cases of misdemeanor, when the punishment is by fine only, and the fine does not exceed two hundred dollars, and also in all cases of assault and assault and battery and affrays, in which the people are plaintiffs, and in cases arising under sections two hundred and seventy and two hundred and seventy-one of Division I. of this act.”¹

¹ R. S., 405, § 381; see *Ex parte Bolling*, 31 Ills., 89, *State v. Dawson*, 17 Iowa, 584.

§ 155. Arrest and Trial. — "In all cases of offense, of which a justice of the peace has jurisdiction, he may, upon the affidavit of any competent person, issue his warrant to any constable of his county for the arrest of any person charged with either of the said offenses, and upon the arrest of such person shall proceed to hear and determine the cause according to law."¹

GENERAL FORM OF AN AFFIDAVIT.

State of Illinois, }
 ——— County. } ss.

A. B., being duly sworn on his oath, says that on² the — day of —, A. D. 18—, at the town of — in the said county, C. D. did (*insert statement³ of the offense in the language of the statute*).

And the said A. B. therefore prays that a warrant may issue for the arrest of the said C. D., that he may be dealt with according to law.

A. B.

Subscribed and sworn to before }
 me this — day of —, A. D. 18—. }
 L. M., J. P.

GENERAL FORM OF A WARRANT IN CASES WHERE THE JUSTICE HAS JURISDICTION.

State of Illinois, }
 ——— County. } ss.

The People of the State of Illinois to any Constable of said County, Greeting:

Whereas, A. B. has this day made an affidavit before L. M., a justice of the peace of the said county, charging C. D. with the offense of (*insert the name of the offense*),—

You are therefore hereby commanded forthwith to arrest the said C. D. and bring him before me the said justice to be dealt with according to law.

Given under my hand and seal this — day of —, A. D. 18—

L. M., J. P. [SEAL.]

¹ R. S., 405, § 382.

² The words "on or about the day named" are sufficiently definite. 2 Arch. C. P. & Pl., 53; *Cokely v. State*, 4 Clark Iowa, 477.

³ The affidavit must allege facts sufficient to constitute an offense; for the constitution of this state gives the accused the right to demand the nature and cause of the accusation and to have a copy thereof. R. S., 60, Con. of Ills., Art. II. § 9; and if this does not show an offense against the law, he should be discharged. *Torry v. People*, 17 Ills., 105. It is otherwise where the complaint is insufficient or informal, R. S. 402, § 359; *ante* § 80, unless the complaint is amended, *ante* §§ 80, 81.

§ 156. **Special Constable.** — “ Any justice of the peace may appoint a suitable person to act as constable in a criminal case where there is a probability that a person charged with any offense will escape, or that goods and chattels will be removed before application can be made to a qualified constable; and the person so appointed shall act as constable in that particular case and no other; and any temporary appointment so made as aforesaid, shall be made by a written indorsement, under the seal of the justice deputing, on the back of the process which the person receiving the same shall be deputed to execute.”¹

FORM OF A WARRANT TO BE DIRECTED TO A PRIVATE PERSON.

State of Illinois, }
 ——— County. } ss.

The People of the State of Illinois to any Constable of the said County, and
 John Doe, Greeting: (*Conclude as in the next previous form.*)

FORM OF APPOINTMENT OF PRIVATE PERSON TO ACT AS CONSTABLE, TO BE
 INDORSED ON WARRANT.

State of Illinois, }
 ——— County. } ss.

I do hereby appoint and depute John Doe, named in the within warrant,
 to execute the same.

Given under my hand and seal this — day of —, A. D. 18—.

L. M., J. P. [SEAL.]

§ 157. **Witnesses — Change of Venue — Continuance — Oaths — Depositions.** — The attendance of witnesses is procured,² a change of venue and continuance,³ and the oath administered to witnesses⁴ in the same manner as in civil cases. When the cause is adjourned the prisoner must be committed or bailed in the same manner as in proceedings for the examination of persons charged with criminal offenses not triable before the justice.⁵ Depositions cannot be taken in

¹ R. S., 405, § 383.

² Id., § 384.

³ Id.

⁴ Id.

⁵ Id.; Id., 402, § 356.

criminal cases without the consent of the accused, for the constitution gives him the right to meet the witnesses face to face.¹ The accused may testify in his own behalf at his own request, but cannot be required to testify in behalf of the people.²

§ 158. **Jury Trial.** — “The person accused may have the cause tried by a jury upon the same conditions, and the jury shall be summoned and impaneled in the same manner, as in civil cases before justices of the peace: *Provided*, it shall not be necessary for the defendant to advance the jury fees.”³

§ 159. **Jury to Determine the Penalty.** — “If the jury find the accused guilty, they shall assess the fine, or fix the punishment, as aforesaid.”⁴

§ 160. **Judgment on Verdict Rendered.** — “Upon the jury returning their verdict the justice shall record the same in his docket or record book, and proceed to render judgment thereon accordingly, with costs. If the jury return a verdict of not guilty, the justice shall discharge the defendant without costs.”⁵

§ 161. **Execution to Issue.** — “Upon the rendition of a judgment imposing a fine, the justice shall, except as otherwise provided, issue execution against the goods and chattels of the defendant for the fine and costs, which may be levied upon any personal property of the defendant not exempt from execution, and proceedings may be had thereon as upon other executions.”⁶

§ 162. **Capias Issued.** — “If the constable shall return upon such execution that the defendant has no goods and chattels whereof to make the money, the justice shall issue a capias against the body of the defendant, and the constable shall arrest such person and commit him to the jail of the county,

¹ R. S., 60, Con. of Ills., Art. II., § 9; *Richardson v. People*, 31 Ills., 173; *Nash v. State*, 2 Greene Iowa, 287.

² R. S., 410, § 426.

³ Id., 405, § 384.

⁴ Id., § 385.

⁵ Id., § 386.

⁶ Id., 406, § 387.

there to remain forty-eight hours; and if the fine exceed ten dollars, then to remain in the said jail twenty-four hours for every five dollars over and above the said ten dollars, and so on, in proportion to the amount of the said fine.”¹

§ 163. **Appeals.** — “The defendant may appeal from the judgment of the justice of the peace in criminal cases to the circuit court of the county, the appeal to be taken in the same time and manner, and upon the same conditions, and with like effect; and like proceedings may be had thereon, as in civil cases, except that no damages shall be allowed, and except that in the county of Cook the appeal shall be to the criminal court of Cook county.”²

§ 164. **Duty of Justices on Appeal.** — “When any defendant convicted of either of the said offenses appeals, it shall be the duty of the justice to return to the clerk of the court to which the appeal is taken, when he returns the papers in the case, the names of all material witnesses.”³

§ 165. **Defendant Guilty — Judgment Rendered.** — “If upon such appeal the defendant shall be found guilty, judgment shall be rendered against both principal and surety in the appeal bond, for the amount of the fine assessed by the jury in said court, and all costs that may have accrued.”⁴

¹ R. S., 406, § 388.

² Id., § 389.

Id., § 390.

⁴ R. S., 406, § 391.

SECTION II.

ASSAULT AND BATTERY.

- § 166. Definitions—What Constitutes an Assault.
167. An Intent to do Harm an Essential Element of an Assault.
168. An Attempt Essential to Constitute an Assault.
169. Effect of Words.
170. Definitions—What Constitutes an Assault and Battery.
171. Who may Commit.
172. What not a Battery.
173. Consent.
174. When a Conductor may Eject a Passenger from a Car.
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189. Proof of Using Offensive Words, when Admissible in Mitigation of the Fine.
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192. Jurisdiction—Indictment—Compromise—Evidence—Mittimus.
193. Reception of the Verdict—Procedure where the Offense is Committed in View of the Justice.
194. Punishment.

§ 166. Definitions — What Constitutes an Assault. — An assault is defined by statute to be “an unlawful attempt coupled with a present ability to commit a violent injury upon the person of another.”¹ This seems to imply that there must be

¹ R. S., 355, § 20; Roscoe Cr. Ev., 286.

an actual attempt as well as intent to do a violent injury, thus somewhat limiting the common law meaning of the term.¹ An attempt to strike another, with or without a weapon, although the party striking misses his aim or is prevented from hitting the other on account of his dodging or running away or by the interference of others, is an assault.² If within shooting distance the aggressor presents a gun at another, provided it be so loaded that it can be discharged,³ or points a pitchfork at him whilst he is standing within reach of it,⁴ or does any other act under such circumstances as satisfy the jury that the aggressor had the ability intended and was attempting to commit a violent injury to another, they should find him guilty of an assault though he fails entirely of accomplishing his purpose.⁵ So where a prisoner decoyed a female under ten years of age into a building for the purpose of ravishing her, and was there detected while standing within a few feet of her in a state of indecent exposure, it was held that though there was no evidence of his having actually touched her, he was properly convicted of an assault.⁶ Formerly it was not necessary that the attempt should be coupled with a present ability to do an injury, but it was sufficient if only a well-founded apprehension was created; as if a gun not in fact loaded was pointed at another within shooting distance, this was an assault;⁷ but under our statute this would not be an assault, for it lacks the element

¹ 2 Arch. C. P. & Pl., 41; *Hays v. People*, 1 Hill, 351; *State v. Davis*, 1 Ired., 125; *Yoes v. State*, 4 Engl., 42.

² 1 Hawks P. C., 110; *Roscoe Cr. Ev.*, 286; 3 Black. Com., 120; *Stephens v. Myers*, 4 Car. & P., 349; *Martin v. Shoppee*, 3 Car. & P., 373.

³ 2 Bish. Cr. L., §§ 23, 28; *Genner v. Sparks*, 6 Mod., 173; *Anonymous*, 1 Vent., 253; *Rex v. James*, 1 C. & K., 530.

⁴ 2 Arch. C. P. & Pl., 40.

⁵ *Roscoe Cr. Ev.*, 286; *Barb. Cr. L.*, 227; 2 Bish. Cr. L., § 23; 2 Arch. C. P. & Pl., 41, 42; *Meador v. Stone*, 7 Met., 147.

⁶ *Hays v. People*, 1 Hill, 351.

⁷ 2 Bish. Cr. L., § 32; *State v. Cherry*, 11 Ired., 475; *State v. Malcolm*, 8 Iowa, 413; *Beach v. Hancock*, 7 Fost. N. H., 223; *Stephens v. Myers*, 4 Car. & P., 349; *State v. Shepard*, 10 Iowa, 130; *State v. Benedict*, 11 Vt., 236; *Reg. v. St. George*, 9 Car. & P., 83; *State v. Smith*, 2 Humph., 457.

of a present ability to commit a violent injury now necessary to complete the offense.¹

§ 167. **An Intent to do Harm is Essential**, and is the gist of an assault, and this is a question for the jury, depending upon the circumstances of each case; therefore it is no assault if words are used showing a purpose not to commit a present violence;² as where one said, laying his hand on his sword, if it was not assize-time he would not take such language;³ or, raising a whip at striking distance, at the same time saying, "Were you not an old man, I would knock you down."⁴ So where the defendant took a pistol and cocked it and held it out as if about to fire, and presented it at the head of another, and said if he was not quiet he would blow out his brains, it was held that the defendant was not guilty of an assault.⁵ So if a man raise his hand against another at striking distance and at the same time say: "If it were not for your gray hairs," etc., it is no assault, because the words explain the action and take away any idea of an intention to strike.⁶ Merely pointing a cane at another in derision, is no assault.⁷

§ 168. **An Attempt Essential to Constitute an Assault.** — Formerly where a defendant raised a deadly weapon against another and stood in an attitude to strike such person, but suspended the blow to afford the object of his vengeance an opportunity to buy his safety by compliance with the defendant's terms, it was an assault though no blow was struck.⁸ As where A, being within striking distance, raised a weapon for the purpose of striking B, and at the same time declared that if B

¹ R. S., 355, § 20; see *James' Case*, 1 C. & K., 580; *State v. Swails*, 8 Ired., 524.

² 1 Hilliard on T., 200; *State v. Blackwell*, 9 Ala., 79; *State v. Davis*, 1 Ired., 125.

³ Bull. N. P., 15; *Com. v. Eyre*, 1 Serg. & R., 347; *Richells v. State*, 1 Sneed, 606; *Tuberville v. Savage*, 1 Mod. 3, 2 Keb., 545.

⁴ *State v. Crow*, 1 Ired., 376; *Blake v. Barnard*, 9 Car & P., 626.

⁵ *Woodruff v. Woodruff*, 22 Ga., 237.

⁶ *Com. v. Eyre*, 1 Serg. & R., 347; *State v. Morgan*, 3 Ired., 186.

⁷ 1 Arch. C. P. & Pl., 42; 1 *Wheeler C. C.*, 410; *People v. Goodwin*, 6 Rogers Rec., 9.

⁸ 2 Arch. C. P. & Pl., 42.

would perform a certain act he would not strike him, and B did perform the required act, in consequence of which no blow was given, it was held to be an assault in A.¹ So where, A and B being close together, A drew a pistol, cocked it, pointed it toward the breast of B, and said, "If you do not pay me my money I will have your life," it was held clearly an assault.² But our statute seems to mean that there should be an actual attempt to do a violent injury,³ which seems to be wanting in these cases; and, therefore, it is presumed that they do not amount to an assault within the meaning of the statute.

§ 169. *Effect of Words.* — No words whatsoever can amount to⁴ or justify⁵ an assault. Yet words may explain and give character to physical acts,⁶ and may so combine with attendant circumstances as to make that an assault, which without the words would not be such.⁷

§ 170. *Definitions — What Constitutes an Assault and Battery.* — An assault and battery is defined by statute to be "the unlawful beating of another."⁸ To beat in a legal sense means not merely to strike with the hand, a stick or the like, but includes every touching, however trifling, in any angry, rude or revengeful manner.⁹ As the mere taking hold of the coat or laying the hands on the person of another, if done in an angry or in a rude and insolent manner;¹⁰ pushing another

¹ *State v. Morgan*, 3 Ired., 136; *Bloomer v. State*, 3 Sneed, 66.

² *Keefe v. State*, 19 Ark., 190; see *State v. Sims*, 3 Strobl., 137.

³ *R. S.*, 355, § 20; *State v. Davis*, 1 Ired., 125; *Yoes v. State*, 4 Engl. Ark., 42.

⁴ 1 Hawk P. C. C., 61, § 1; *Stephens v. Myers*, 4 Car. & P., 349; *Keyes v. Develyn*, 3 E. D. Smith, 518; *People v. Bransly*, 32 N. Y., 525; *State v. Wood*, 1 Bay, 351.

⁵ 2 Bish. Cr. L., § 40; *State v. Wood*, 1 Bay, 351; *Cushman v. Ryan*, 1 Story, 91; *Winfield v. State*, 3 Greene Iowa, 339; *Donnelly v. Harris*, 41 Ills., 126; *Ogden v. Claycomb*, 52 Ills., 366; *Burchard v. Booth*, 4 Wis., 67.

⁶ *State v. Crow*, 1 Ired., 375; *Com. v. Eyre*, 1 Serg. & R., 347.

⁷ 2 Bish. Cr. L., § 25.

⁸ *R. S.*, 35, § 21.

⁹ 1 Hawk P. C., Chap. 62, § 1; *Johnson v. Tompkins*, 1 Baldw. C. C., 571.

¹⁰ *U. S. v. Ortega*, 4 Wash. C. C., 531.

in anger or jostling him out of the way;¹ spitting in his face;² throwing a squib at him;³ sprinkling paint on him;⁴ holding him by the arm;⁵ pushing another against him;⁶ striking a horse upon which he is riding, whereby he is thrown;⁷ throwing water upon him;⁸ or the like;⁹ striking one's cane while in his hand; so a blow on the skirt of one's coat when upon his person is an assault and battery.¹⁰ If the keeper of the poor-house cut off the hair of a female pauper without her consent and against her wishes, it is an assault and battery.¹¹ It is not necessary that the injury should be done by the hand of the defendant.¹² It may be by encouraging a dog to bite¹³ or by riding over a person with a horse,¹⁴ or by willfully and violently driving a cart against the carriage of another person and thereby causing bodily injury to the person traveling in it.¹⁵ It seems the injury need not be immediate; where A threw a lighted squib into a market-place, which being tossed from hand to hand by different persons at last hit B, and put out his eye, it was held that this was actionable as an assault and battery.¹⁶ The offense may be committed without any active participation by encouraging, abetting, counseling, and procuring others to commit an assault and battery. As where a number of persons assemble to witness a prize fight, they are all equally guilty with the

¹ Barb. Cr. L., 228; 6 Mod., 149.

² *People v. Lee*, 1 Wheeler C. C., 410; 6 Mod., 172.

³ 2 W. Black., 892.

⁴ 2 Arch. C. P. & Pl., 45.

⁵ 6 Mod., 172.

⁶ Bul. N. P., 16.

⁷ 1 Mod., 24; W. Jones, 444.

⁸ *Purcell v. Home*, 3 N. & P., 564; 3 A. & El., 602.

⁹ Barb. Cr. L., 228; Roscoe Cr. Ev., 288.

¹⁰ 1 Dal., 114; *State v. Davis*, 1 Hill, S. C., 46.

¹¹ *Forde v. Skinner*, 4 Car. & P., 239.

¹² 2 Arch. C. P. & Pl., 47; Roscoe Cr. Ev., 288.

¹³ 2 Bish. Cr. L., § 28.

¹⁴ *State v. Sims*, 3 Strob., 137; *Morton v. Shopee*, 3 Car. & P., 373.

¹⁵ *People v. Lee*, 1 Wheeler C. C., 364; *Com. v. Eyre*, 1 Serg. & H., 347.

¹⁶ 2 Arch. C. P. & Pl., 47; 2 Starkie, 388, 389; *Scott v. Shepherd*, 2 Blk. Rep., 892; 3 Wils., 403.

principals if they concur with, encourage, and co-operate with those engaged in the fight.¹ So where the husband was present and did not interfere in any way while the wife committed the assault and battery, it was held that the jury had a right to infer that she acted with his consent and approbation, which would make him a joint trespasser with her.² If one person employs another to commit an assault and battery, and the act is perpetrated in the absence of the employer, both are guilty.³

§ 171. **Who may Commit.** — Infants, if old enough to commit⁴ a crime, and a corporation, may be guilty of an assault and battery,⁵ although a corporation can only be made liable in a civil action;⁶ yet it has been held that a corporation may be indicted for neglecting to do what the law requires⁷ or for a misfeasance.⁸

§ 172. **What not a Battery.** — It is no battery for a man to punch another in earnest discourse.⁹ So if one stands passively like an inanimate object—"like a door wall"—and thus obstructs the going of another into a room which he has a right to enter,¹⁰ or strikes at another at such a distance that he cannot possibly touch him,¹¹ it is neither an assault nor battery.

§ 173. **Consent** in some cases will prevent a party from being guilty of an assault and battery, though if the act had been

¹ 2 Arch. C. P. & Pl., 47; 1 Lewin, 17, *Sikes v. Johnson*, 16 Mass., 389; *Avery v. Buckley*, 1 Root, 275; *Gillon v. Wilson*, 3 Monr., 217.

² 2 Arch. C. P. & Pl., 47; *Phillips v. Phillips*, 7 B. Monr., 268.

³ 2 Arch. C. P. & Pl., 48; *Bell v. Miller*, 5 Ohio, 250; *State v. Lymburn*, 1 Brev., 397; *Drake v. Ramsey*, 5 Ohio, 251.

⁴ *Bullock v. Babcock*, 3 Wen., 391.

⁵ *St. Louis, Alton & Chicago R. R. Co. v. Dalby*, 19 Ills., 366; *C. & N. W. R. R. Co. v. Peacock*, 43 Ills., 253.

⁶ *Id.*; 1 Black. Com., 503; 2 Arch. C. P. & Pl., 45; 1 Whart. Cr. L., §§ 85. 90; 1 Bish. Cr. L., § 422.

⁷ 1 Whart. Cr. L. §§ 85-90; 1 Bish. Cr. L., §§ 419, 421; *People v. Corporation of Albany*, 11 Wen., 539.

⁸ 1 Whart. Cr. L., § 87; 1 Bish. Cr. L., §§ 420, 422.

⁹ *Gilb. Ev.*, 256; 1 *Hilliard on T.*, 203, 204.

¹⁰ 2 Bish. Cr. L., § 27; *Inness v. Wylie*, 1 C. & K., 257; *Smith's Case* 2 Car. & P., 449.

¹¹ *Barb. Cr. L.*, 228.

committed without such consent he would have been guilty.¹ As where a surgical operation is performed, or one in good faith whips another at his request to save him, as is mistakenly supposed, from a prosecution for a felony.² But a party has no right to consent that another shall strike, hurt, maim or injure him unless he in good faith believes it will be a benefit to him, for a consent for any other purpose would be against public policy and void, therefore no justification for an assault or battery.³ As where two or more agree to fight and strike one another, they are each, and their abettors, guilty of an assault and battery, and it is quite immaterial which strikes the first blow.⁴ If the consent is obtained by fraud, and the party is thereby induced to believe that it will be for his or her benefit, when in truth and fact it will not, such consent is no justification for the assault or battery.⁵ Thus if a school-master takes indecent liberties with a female pupil who does not resist, her tender years and relative subjection to him may justify a jury in heeding her testimony that what was done was really against her will, in pronouncing him guilty.⁶ Likewise where a medical practitioner had sexual connection with a girl of fourteen who forbore resistance under the belief that he was treating her medically, as he represented himself to be, the English judges held him guilty.⁷ So where a man had connection with a married woman under the pretence of being her husband, he was held guilty of assault and battery.⁸ And where a medical man

¹ 1 Arch. C. P. & Pl., 47; *Pillow v. Bushnell*, 5 Barb., 156; *Reg. v. Meredith*, 8 Car. & P., 589.

² *State v. Breck*, 1 Hill S. C., 363.

³ 1 Bish. Cr. L. § 260; 2 Bish. Cr. L., § 35; *Roscoe Cr. Ev.*, 289.

⁴ *Rex v. Perkins*, 4 Car. & P., 537; *Rex v. Billingham*, 2 Car. & P., 234; *Reg. v. Brown*, Car. & M. 314; *Rex v. Lewis*, 1 C. & K., 419; but see *Champer v. State*, 14 Ohio S., 437; *Duncan v. Com.*, 6 Dana, 295;

⁵ 1 Bish. Cr. L., § 261.

⁶ *Rex v. Nichol*, Russ. & Ry., 130; 1 Bennet & Hurd Lead. C., 513; *Rex v. Day*, 9 Car. & P., 449.

⁷ *Reg. v. Reed*, 1 Den. C. C., 377; 2 Car. & K., 957; *Reg. v. Martin*, 9 Car. & P., 213; *Reg. v. Case*, 1 Eng. L. & Eq., 544.

⁸ *Rex v. Williams*, 8 Car. & P., 286; *Rex v. Sanders*, 8 Car. & P., 265; *Rex v. Stanton*, 1 Car. & K., 415.

stripped with his own hands a female naked under the presence of examining her, he was held guilty of an assault and battery.¹ But where a girl nine years old consented according to the finding of the jury to sexual commerce with some boys, the court refused to sustain the conviction of the boys for assault.²

§ 174. **When Conductor may Eject a Passenger from a Car.** — A person is not guilty of an assault and battery if he resists the conductor of a railroad car while he is attempting to put him off the cars without stopping, under circumstances which may endanger his life.³ The same rule applies to a passenger on a city railroad car drawn by horses.⁴ Since a railroad company has no right to put off a passenger except at a regular station or usual stopping-place for the non-payment of his fare, if the conductor attempts to do it, he is guilty of an assault and battery, and the passenger has a right to resist him.⁵ But if any passenger shall refuse to pay his fare or to comply with any reasonable regulation of the railroad company, it is lawful for the conductor of the train and the servants of the corporation, after having requested him to leave the car, to put him out at any usual stopping-place the conductor may select⁶ if they use no more force than is necessary to accomplish the purpose.⁷ Where the passenger has once refused to pay his fare, he may be put off the train though he subsequently offers to pay, for under such circumstances the conductor is not bound to receive the fare and permit the passenger to remain on the train.⁸ If a passenger

¹ *Rex v. Rosinski*, 1 Mood. C. C., 191; *Rex v. Stanton*, 1 Car. & K., 415.

² *Reg. v. Read*, 1 Den. C. C., 377.

³ *Sanford v. Eighth Av. R. R. Co.*, 23 N. Y., 343.

⁴ *Id.*

⁵ *R. S.*, 812, § 69; *Parks v. C. B. & Q. R. R. Co.*, 18 Ills., 460; *Terre Haute, A. & St. L. R. R. Co. v. Vanatta*, 21 Ills., 188; *I. C. R. R. Co. v. Sutton*, 53 Ills., 397; *Chi. & A. R. R. Co. v. Flagg*, 43 Ills., 364; *I. C. R. R. Co. v. Whittemore*, 43 Ills., 42.

⁶ *Id.*; *State v. Chovin*, 7 Iowa, 204.

⁷ *Id.*

⁸ *People v. Jilson*, 3 Park. Cr. R., 234.

refuses to surrender his ticket on demand,¹ or uses grossly profane and indecent language, or disturbs the peace and safety of the other passengers,² the conductor will be justified in putting him off the cars between the stations.

§ 175. **Accident.** — Where a man doing a lawful act, without any intention of doing an injury, unfortunately or by accident hurts or injures another, he is not guilty of an assault and battery;³ as for assisting a drunken man or preventing him from going without help, though he is thereby hurt;⁴ or where a soldier in discharging his musket by lawful military command unavoidably hurts another;⁵ or a horse, by a sudden fright, runs away with his rider, not being accustomed so to do, and runs against a man;⁶ or an injury is done by an unavoidable accident in a friendly wrestling-match or other lawful athletic sport, if not dangerous.⁷ It seems to be the general rule that the same facts which would make killing a justifiable homicide by misadventure, will be a good defense in a criminal action for an assault and battery.⁸ But it is a battery if one of two persons fighting or engaged in any unlawful act inadvertently or unintentionally hit a third person, for no principle is better settled than that every one should be responsible for his unlawful act.⁹

§ 176. **Correction.** — Every parent has a right to correct his child,¹⁰ the guardian his ward,¹¹ the master his apprentice,¹² the

¹ *I. C. R. R. Co. v. Whittemore*, 43 Ills., 420; *People v. Caryl*, 3 Park. Cr. R., 326.

² *People v. Caryl*, 3 Park. Cr. R., 326.

³ *Roscoe Cr. Ev.*, 289; *Barb. Cr. L.*, 229; *Rex v. Gill*, 1 Stra., 190.

⁴ *Bull. N. P.*, 16; 1 Russ. by Grea., 751-2.

⁵ *Weaver v. Ward*, Hob., 134; 2 Roll. Ab., 548; *Rex v. Gill*, 1 Stra., 490.

⁶ *Gibbons v. Pepper*, 4 Mod., 405.

⁷ *Com. Dig. Pleader*, 3 M., 18; *State v. Elliot*, 11 N. H., 540.

⁸ 1 Whart., § 1254.

⁹ 2 Arch. C. P. & Pl., 63; *James v. Campbell*, 5 Car. & P., 372.

¹⁰ 1 Black. Com., 452; 1 Chitty Gen. Pr., 64; *Johnson v. State*, 2 Humph., 283; 3 Greenl. Ev., § 63; *Smith v. Slocum*, 62 Ills., 354.

¹¹ 2 Arch. C. P. & Pl., 61; *Roscoe Cr. Ev.*, 290.

¹² 2 Arch. C. P. & Pl., 87; *Winstone v. Linn*, 1 B. & C., 469; *People v. Phillips*, 1 Wheeler C. C., 155.

teacher his scholar.¹ But in inflicting corporal punishment they are respectively to exercise reasonable judgment and discretion, and be governed as to the mode and severity of the punishment by the nature of the offense, the age, size and apparent powers of endurance of the child, ward, apprentice or scholar.² The cause must be sufficient, the instrument suitable to the purpose, and the punishment administered in moderation.³ And it will be for the jury to determine whether the punishment was excessive and improper.⁴ The authority of the master to correct his apprentice is personal and cannot be delegated to another.⁵ The master has no right to correct his hired servant.⁶ There are authorities holding that in former times the husband could govern and control the wife to a limited extent;⁷ but at the present time he has no right to beat his wife nor to inflict corporal punishment upon her for correction.⁸ He may be convicted of an assault and battery if he strikes her, the same as any other person.⁹ A person may confine a friend who is insane, and bind and beat him if necessary, and under such circumstances it is no assault and battery.¹⁰ But if more force and violence is used than is actually necessary, in such case it is an assault and battery of the most aggravated character.¹¹ The authority to govern is placed by the law in the father as the head of the family, and he may rightfully use so much

¹ Morris' Case, 1 City Hall Rec., 52; Com. v. Randall, 4 Gray, 36.

² 1 Hilliard on T., 212; Roscoe Cr. Ev., 290; Fletcher v. People, 42 Ills., 395; Com. v. Randall, 4 Gray, 36.

³ Fletcher v. People, 42 Ills., 395; Cooper v. McJunkin, 4 Ind., 290.

⁴ 2 Arch. C. P. & Pl., 61; Com. v. Randall, 4 Gray, 36.

⁵ 2 Arch. C. P. & Pl., 87; People v. Phillips, 1 Wheeler C. C., 155.

⁶ 1 Chitty C. P., 73-75; 2 Arch. C. P. & Pl., 87; Matthews v. Terry, 10 Conn., 225, Newman v. Bennett, 2 Chitty R., 195; Com. v. Baird, 1 Ashm., 267.

⁷ 1 Black. Com., 444; 1 Hawk P. C., 2; 2 Kent. Com., 181; State v. Chase, 1 Walker, 156; Robbins v. State, 20 Ala., 36.

⁸ People v. Winters, 2 Park. Cr. R., 10.

⁹ 2 Harring., 552; 1 Bish. Cr. L., § 891.

¹⁰ Roscoe Cr. Ev., 290; 2 Arch. C. P. & Pl., 44; 3 Greenl. Ev., § 63.

¹¹ 2 Bish. Cr. L., § 38.

force as is necessary to maintain order and propriety in his household.¹

§ 177. *Defense of Self, Etc.* — It is a good defense that the alleged assault and battery was in defense of self,² wife,³ husband,⁴ parent,⁵ child,⁶ servant,⁷ apprentice⁸ or even a stranger.⁹ But it has been held that a servant cannot justify a battery in the defense of his master's son;¹⁰ nor a tenant in defense of his landlord.¹¹ Yet in our opinion any person may use force enough to prevent another, even a stranger, from being killed or injured.¹² It is a good justification of a wounding or mayhem that the prosecutor assaulted and beat the defendant first, and that the defendant committed the alleged battery merely in his own defense.¹³ Where a man assaults another the latter is justified in instantly repelling it without waiting until he has received corporal injury. As where a man offers to strike another, the latter may at once attack him without waiting to be struck first.¹⁴ But great care must be taken that the battery be such only as is necessary to repel the intended violence, for if it be excessive, if it be greater than is necessary for mere defense, the prior assault will be no justification.¹⁵

¹ *Smith v. Slocum*, 62 Ills., 354.

² *Vandermark v. People*, 47 Ills., 122; *Ogden v. Claycomb*, 52 Ills., 366; *Scribner v. Beach*, 4 Denio, 448.

³ *Roll. Abr.*, 546; 1 *Hawk C.*, 60, §§ 23, 24; *Roscoe Cr. Ev.*, 291; *Barb. Cr. L.*, 230.

⁴ 2 *Arch. C. P. & Pl.*, 56; *Barb. Cr. L.* 229; *Bull. N. P.*, 48; 1 *Ld. Raym.*, 62.

⁵ *Id.*

⁶ *Id.*; *Hill v. Rogers*, 2 *Iowa*, 67.

⁷ *Id.*, *Roscoe Cr. Ev.*, 291; 3 *Greenl. Ev.*, § 65.

⁸ *Orton v. State*, 4 *Greene Iowa*, 140.

⁹ 2 *Arch. C. P. & Pl.*, 45; 1 *Hawk C.*, 62, § 3.

¹⁰ *Hawk P. C. Ch.*, 60, § 24; *Roscoe Cr. Ev.*, 291.

¹¹ *Seward v. Basiley*, 1 *Ld. Raym.*, 62; *Gillon v. Wilson*, 3 *Monr.*, 217.

¹² 2 *Arch. C. P. & Pl.*, 56; 1 *Bish. Cr. L.*, § 877; 3 *Greenl. Ev.*, § 65, *n.* 6.

¹³ *Barb. C. L.*, 229.

¹⁴ 2 *Arch. C. P. & Pl.*, 55; *Dale v. Wood*, 7 *Moore*, 33; *State v. Davis*, 1 *Ired.*, 125.

¹⁵ 2 *Arch. C. P. & Pl.*, 55; *State v. Quinn*, 2 *South Car.*, *Const. R.*, 694; *Gates v. Lounsberry*, 20 *John.*, 427; *Elliot v. Brown*, 2 *Wen.*, 497; *Curtis v. Carson*, 2 *N. H.*, 539; *Baldwin v. Hayden*, 6 *Conn.*, 453; *Shain v. Markham*, 4 *J. J. Marsh.*, 578.

As where it appeared that the defendant, although he first struck in defense, afterward continued to strike from revenge after the necessity for it had ceased, he was held guilty of an assault and battery. The true rule is, that if the circumstances attending the assault are such as to justify a reasonable conclusion in the mind of the defendant of impending danger or serious bodily injury, and he commits the battery from the instincts of self-preservation, he is not guilty, although he is not in any actual danger.¹ But one attacked with a knife, believing and having reason to believe that he is in imminent danger of being wounded, is justified in shooting the assailant.² Yet if a person is attacked by another of equal strength he has no right to use a deadly weapon, as a knife, poker, hatchet or hammer, against a fist or cane.³ Nor has a party the right to beat the aggressor after he has been disabled or has submitted.⁴

§ 178. *When Both Parties Guilty.*—Both of the parties may be guilty of an assault and battery in the same affray, the one for the first assault and battery—the other for the excess of force used beyond what was necessary for self-defense.⁵ For a party having been struck has no right to retaliate by an assault and battery when it is in his power to keep aloof from the party striking.⁶ And if the act be accompanied by declarations or other unquestionable evidence of the absence of an intention to do any further violence, then the party is notified

¹ *Campbell v. People*, 16 Ills., 17; *Hopkins v. People*, 18 Ills., 264; *Ogden v. Claycomb*, 52 Ills., 366; *Scribner v. Beach*, 4 Denio, 448; *Hill v. Rogers*, 2 Iowa, 67.

² 1 Bish. Cr. L., § 865; *Rapp v. Com.*, 14 Monr., 614

³ 1 Hilliard on T., 211; *Dole v. Erskine*, 35 N. H., 503; *Shorter v. People*, 2 N. Y., 193;.

⁴ *Roscoe Cr. Ev.*, 290; *East. P. C.*, 272; *U. S. v. Wiltberger*, 3 Wash. C. C., 515; *State v. Clements*, 32 Me., 279; *State v. Burke*, 30 Iowa, 331; *Ogden v. Claycomb*, 52 Ills., 366.

⁵ *Ogden v. Claycomb*, 52 Ills., 366; *Dole v. Erskine*, 35 N. H., 503; *Bartlett v. Churchill*, 24 Vt., 218.

⁶ 1 Arch. C. P. & Pl., 55; *State v. Gibson*, 10 Ired., 214; *Reg. v. Driscoll*, 1 C. & Mars., 214.

of the absence of any intention to commit a further battery and will not be justified in using further violence.¹

§ 179. **When Self-defense, etc., is not a Justification.** — In reply to the defense that the assault and battery was committed in the defense of self, etc., it may be shown that the first assault was justifiable.² So it may be shown that the first assault was committed at a sufficient time previous for the blood to cool, and was no part of the same transaction;³ or that the aggressor had ceased to strike, and that the battery was unnecessary for the defense, and was committed in retaliation and revenge instead of in defense;⁴ or that the force used exceeded the necessity of the case.⁵ A party having been struck has no right to retaliate by an assault when it is in his power to keep aloof from the party striking.⁶

§ 180. **Defense of Possession.** — The defendant may justify an assault and battery in the defense of his real or personal property.⁷ As to restrain the person assaulted from taking his goods⁸ or from taking or rescuing cattle, etc., in his custody upon distress,⁹ or from taking, by the owner of personal property, from

¹ *State v. Sims*, 3 Strob., 127; *Ogden v. Claycomb*, 52 Ills., 366.

² *Barb. Cr. L.*, 230; *Bull. N. P.*, 18; 2 *Bish. Cr. L.*, § 39; *State v. Hooker*, 17 Vt., 658; *Com. v. Kirby*, 2 Cush., 577; *Reg. v. Mabel* 9 Car. & P., 474.

³ *Avery v. Ray*, 1 Mass., 12; *Barry v. Ingalls*, 1 Tay., 121; *Lee v. Woolsey*, 19 John., 319; *Willis v. Forrest*, 2 Duer, 310; *Collins v. Todd*, 17 Mis., 537; *Burchard v. Booth*, 4 Wis., 67; *Corning v. Corning*, 1 Seld., 97.

⁴ *Ogden v. Claycomb*, 52 Ills., 366; *State v. Gibson*, 10 Ired., 214; *Stoffer v. State*, 15 Ohio S., 47; *State v. Hill*, 4 Dev. & Bat., 491; *State v. Ingold*, 4 Jones N. C., 216.

⁵ *Baldwin v. Haydon*, 6 Conn., 453; *State v. Lazarus*, 1 Rep. Const. Ct., 34; *Watrous v. Steel*, 4 Vt., 629; *Shain v. Markham*, 4 J. J. Marsh, 578; *Ogden v. Claycomb*, 52 Ills., 366.

⁶ 2 *Arch. C. P. & Pl.*, 55; *State v. Gibson*, 10 Ired., 214; *Reg. v. Driscoll*, 1 C. & Mars., 214.

⁷ *Phillips v. City of Springfield*, 39 Ills., 83; *Woodman v. Howell*, 45 Ills., 367; *Weaver v. Bush*, 8 T. R., 78; *Com. v. Kennard*, 8 Pick., 133; *State v. Godsey*, 13 Ired., 348; *Harrington v. People*, 6 Barb., 607; *Barnes v. Martin*, 15 Wis., 240; *Jones v. Tresilian*, 1 Mod., 136; *Huper v. Morrison*, 27 Wis., 365.

⁸ *Barnes v. Martin*, 15 Wis., 240; *Gates v. Lounsbury*, 20 John., 427; *Gregory v. Hill*, 8 Term., 299; *Collins v. Renison*, Sayer, 138.

⁹ 2 *Roll. Abr.*, 10; *Barb. Cr. L.*, 230; *Anon.*, 11 Mod., 64.

the peaceable though wrongful possession of another;¹ or to remove the prosecutor out of his close or house;² or to prevent him from entering it.³ But the distinction is to be observed that possession in fact will justify violence if necessary to defend it;⁴ but a mere right to the possession will not justify an assault and battery for the purpose of obtaining possession, whether the person assaulted or a third person be in possession.⁵ When the justification is claimed in the defense of the possession, both claiming possession, the question for the jury is, which party had actual possession?⁶ Where a person enters the house or premises of another, and is requested to depart but refuses so to do, the owner may eject him without being guilty of an assault and battery, provided he uses no more force than is necessary.⁷ But if he turns him out with a kick⁸ when gentler measures will do, he will be liable.⁹ If the entry was with force and violence, it is lawful to oppose force to force, and in such case the intruder may be ejected without a previous request to leave.¹⁰ If, however, a person enters another's premises quietly, the owner cannot justify turning him out without a previous request to leave.¹¹ The force used in the defense of one's possession must be appropriate in kind and suitable in degree to accomplish the pur-

¹ *Barnes v. Martin*, 15 Wis., 240; *Andre v. John*, 5 Blackf., 357; *Scribner v. Beach*, 4 Denio, 448; *Hyatt v. Wood*, 4 John., 158.

² *Phillips v. City of Springfield*, 39 Ills., 83; *Woodman v. Howell*, 45 Ills., 367.

³ *Barb. Cr. L.*, 230; *Harrington v. People*, 6 Barb., 607.

⁴ 1 *Hilliard on T.*, 208; *Newkerd v. Sabler*, 9 Barb., 652.

⁵ *Parsons v. Brown*, 15 Barb., 590; *Hyatt v. Wood*, 3 John., 239; *Barnes v. Martin*, 15 Wis., 240.

⁶ *Id.*

⁷ *Phillips v. City of Springfield*, 39 Ills., 83; *Woodman v. Howell*, 45 Ills., 367; *Com. v. Clark*, 2 Met., 23.

⁸ *Wild's case*, 2 *Lewin*, 214; *McCoy v. State*, 3 *Engl.*, 451.

⁹ *State v. Lazarus*, 1 *Mills*, 34; *Reg. v. Sullivan*, *Car. & M.*, 209.

¹⁰ 2 *Arch. C. P. & Pl.*, 56, 57; *Roscoe Cr. Ev.*, 292; *McDermott v. Kennedy*, 1 *Harring.*, 143; *McIlvoy v. Cockran*, 2 *A. R. Marsh*, 669; *State v. Sagarus*, 1 *Rep. Con. Ct.*, 34.

¹¹ 2 *Arch. C. P. & Pl.*, 57; *Watrous v. Steel*, 4 *Vt.*, 629.

pose,¹ and must not be excessive.² Yet if the trespasser uses force in resisting the attempt to remove him, the owner may, after requesting him to leave, oppose force to force; and in such case if he be assaulted and beaten, he may justify even a mayhem or wounding in self-defense.³ But the trespasser has a right to defend himself from unreasonable and unnecessary violence.⁴

§ 181. *Resistance to Prevent a Levy, when Justified.* — It has been held that if an officer attempts to take on an execution the goods of a person other than the defendant in execution, from his possession, such person may maintain his possession by force in the same manner as he might against any trespasser who is not an officer.⁵ So it has been held that when an officer attempts to levy an execution on articles exempt by law from levy and sale on execution, after being warned of the fact, the owner may employ as much force as is necessary to prevent the levy.⁶ After the officer is once in the peaceable possession of the property, the owner is guilty of an assault and battery if he attempts to take it from the officer by force.⁷

§ 182. *Defense of Possession no Justification if Battery was Excessive or the Other Party had a Right of Entry.* — In answer to the justification in the defense of the possession, the other party may prove that the battery was excessive⁸ or unnecessary.⁹ As where one took hold of a rake in the defendant's hands in order to take it from him, upon which the defendant immediately knocked him down with his fist, it was held that the defendant was not justified.¹⁰ So the person assaulted may

¹ *Com. v. Goodwin*, 3 Cush., 154; 1 Bish. Cr. L., § 859.

² *State v. Clements*, 32 Me., 279; *State v. Lazarus*, 1 Mills, 34.

³ *Barb. Cr. L.*, 230; *State v. Johnson*, 12 Ala., 840.

⁴ *People v. Gulick*, Lalor, 229.

⁵ *Wentworth v. People*, 4 Scam., 551; *Com. v. Kennard*, 8 Pick., 133.

⁶ *State v. Johnson*, 12 Ala., 840; but see *Cokely v. State*, 4 Iowa, 477; *contra*, *State v. Donner*, 8 Vt., 424; *Faris v. State*, 3 Ohio N. S., 159.

⁷ *People v. Cooper*, 13 Wen., 379; *Cokely v. State*, 4 Iowa, 477.

⁸ 2 Bish. Cr. L., § 38; *Sikes v. Dyke*, 17 Ohio, 454; *Bartlett v. Churchill*, 24 Vt., 218; *French v. Martin*, 4 Fost. N. H., 440; *Com. v. Ford*, 5 Gray, 475.

⁹ *McAuley v. State*, 3 Greene Iowa, 435.

¹⁰ *Scribner v. Beach*, 4 Denio, 448.

justify the alleged trespass on the defendant's possession by proving, that he had a right of way over the close, or the like;¹ or that he went to the house of the defendant to serve a subpoena upon him, and finding the outer door open, entered peaceably, and only used so much force as was necessary to overcome the resistance which he met with in the service of the subpoena.² An assault or battery is not justified by a mere suspicion or fear of an encroachment upon the defendant's possession or property.³

§ 183. **Battery Justified by Authority of Law.**—It is a sufficient justification to show that the assault and battery was done under the authority of law, with or without process, no greater assault or battery being committed than was necessary;⁴ as if one lay his hands gently on another, and tell the officer this is the man whom he seeks;⁵ or lay his hands upon a man if it be necessary to serve him with a civil process;⁶ or if an officer having a warrant against a man who will not suffer himself to be arrested, beat or wound him in the attempt to take him,⁷—in all of which cases the party is justified. But an officer can only justify laying his hands upon a man in order to arrest him on a writ or process unless he resists or an attempt is made to rescue him.⁸ And even then he can justify no greater force than was necessary in order to secure his person.⁹ But where the party's clothes and person were injured on a recaption after one escape, and in an effort to overcome resistance and prevent another escape, the onus is upon him to prove excessive force.¹⁰

§ 184. **Process no Justification unless Produced — Jurisdiction.**—

¹ Barb. Cr. L., 230.

² Hagar v. Danforth, 20 Barb., 16.

³ McAuley v. State, 3 Greene Iowa, 435.

⁴ Barb. Cr. L., 230; Roscoe Cr. Ev., 292; 3 Greenl. Ev., § 65.

⁵ 2 Arch. C. P. & Pl., 44.

⁶ Harrison v. Hodgeson, 10 B. & C., 445; 5 Man. & Ry., 392.

⁷ 2 Arch. C. P. & Pl., 44.

⁸ Barb. Cr. L., 231; Roscoe Cr. Ev., 229; 1 Ld. Raym., 229; 2 Stra., 1049.

⁹ Barb. Cr. L., 231.

¹⁰ Henry v. Lowell, 16 Barb., 268.

An officer cannot justify an assault and battery committed by him in the execution of process without producing the process in evidence,¹ nor unless the process is valid on its face and the court or magistrate has jurisdiction to issue it.²

§ 185. **Enumerated Cases where a Battery is Justified by Authority of Law.** — A man may justify an assault and battery in the suppression of a riot or in preventing the commission of a felony or breach of the peace.³ If, therefore, A and B are fighting, and C comes and takes one of them by the collar, in order to separate the combatants, he is not guilty of an assault and battery.⁴ So a man may justify laying hands upon another to prevent him from rescuing goods taken in execution⁵ or the like.⁶ So an officer or private person may justify an assault and battery in making an arrest, either with⁷ or without process,⁸ where such an arrest is authorized by law.⁹

§ 186. **Former Acquittal or Conviction.** — It is a good defense that the defendant was formerly tried upon the merits for the same offense and acquitted¹⁰ or convicted.¹¹ But a criminal action in the name of the people for an assault and battery may be sustained though there is a civil suit pending in the name of the party injured for the same cause.¹² So a criminal action

¹ *People v. Muldoon*, 2 Park. Cr. R., 13; but see *Chase v. People*, 40 Ills., 352.

² *Bowman v. St. John*, 43 Ills., 337.

³ Whart. Cr. L., § 1260; *Roscoe Cr. Ev.*, 291; 3 *Greenl. Ev.*, § 65; 2 *Arch. C. P. & Pl.*, 64; *Rex v. Hunt*, 1 *Moody*, 93; *Handcock v. Baker*, 2 *Bos. & Pul.*, 260.

⁴ 1 *Hawk P. C. C.*, 62, § 2.

⁵ Whart. Cr. L., § 1260.

⁶ 3 *Lev.*, 113.

⁷ 2 *Bish. Cr. L.*, § 37.

⁸ *People v. Adler*, 3 *Park. C. R.*, 254; *Phillips v. Tuell*, 11 *John.*, 486; *Holley v. Mix*, 3 *Wen.*, 350; *Bryan v. Bales*, 15 *Ills.*, 87; *Main v. McCarty*, 15 *Ills.*, 443; *Dodds v. Board*, 43 *Ills.*, 95; *Paige v. Du Puy*, 40 *Ills.*, 507. *Marsh v. Smith*, 49 *Ills.*, 397; *Kindred v. Stitt*, 51 *Ills.*, 401.

⁹ *Ante* § .

¹⁰ 1 *Arch. C. P. & Pl.*, 360.

¹¹ *Id.*, 371.

¹² 1 *Bish. Cr. L.*, § 266; *People v. Judges of Genesee*, 13 *John.*, 85; *Cook v. Ellis*, 6 *Hill*, 467; *Jones v. Clay*, 1 *Bos. & Pul.*, 191; *Jacks v. Bill*, 3 *Car. & P.*, 316; *Caddy v. Barlow*, 1 *Man. & Ry.*, 275.

may be sustained though there is a judgment in the civil action for or against the defendant. But a judgment in an action in which the people are the plaintiffs against the defendant, or in his favor, is a complete bar to another action for the same cause in the name of the people,¹ unless such judgment was obtained by fraud or contrivance of the defendant for the purpose of escaping the punishment he deserves;² as if he procures some friendly person to make a complaint who will suppress a part of the evidence or some or all the circumstances tending to increase the fine or punishment, and thereby procure himself to be acquitted or fined a nominal sum, when he has been guilty of an aggravated assault and battery, in which case the judgment will be no bar to another action for the same cause.³ So the defendant cannot show a former conviction before a justice of the peace founded upon the information and confession of himself.⁴ If a party procures himself to be convicted of an offense where the punishment is fixed by statute, and that the sum has been so fixed and paid by him, and therefore the state has not suffered by the fraud, the conviction will be a bar to another action for the same cause.⁵ One may be indicted for an assault committed in view of the court, though previously fined for the contempt.⁶

§ 187. **Former Acquittal or Conviction, how Proved.** — The defense of a former acquittal or conviction must be proved by the record formally made up if the party was tried in a court

¹ 1 Arch. C. P. & Pl., 360, 361; *McWilliams v. Bragg*, 3 Wis., 424.

² *State v. Little*, 1 N. H., 257; *Com. v. Jackson*, 2 Va. Cas., 501; *Com. v. Alderman*, 4 Mass., 477; *State v. Colvin*, 11 Humph., 599; *Bulson v. People*, 31 Ills., 409; *Com. v. Elliot*, 2 Mass., 372.

³ 1 Bish. Cr. L., § 1010; 3 Greenl. Ev., § 38; *State v. Greene*, 16 Iowa, 239; but see *State v. Casey*, *Busbee*, 209.

⁴ 2 Mass., 371; *Com. v. Alderman*, 4 Mass., 477; *State v. Spencer*, 10 Humph., 481.

⁵ *Hamilton v. Williams*, 1 Tyler, 15; *State v. Little*, 1 N. H. 257; *State v. Atkinson*, 9 Humph., 6; *Burdett v. State*, 9 Texas, 43.

⁶ 2 Arch. C. P. & Pl., 49; *State v. Mann*, 2 Dev., 263; *State v. Yancy*, 1 Car. L. R., 519.

of record,¹ and the indictment, with the finding of the jury indorsed thereon by the proper officer, is not sufficient.² To show a conviction or acquittal before a magistrate, his docket should be produced,³ accompanied with such evidence, either oral⁴ or otherwise, as may be necessary to show that the offenses are really the same; and for this purpose the defendant may show by a witness what a witness on a former trial swore to, although the latter witness is still alive and within the reach of subpoena.⁵

§ 188. *Evidence in Mitigation of the Fine.* — There are some excuses which, though not sufficient to justify an assault and battery, yet may be received in mitigation of the punishment for the offense;⁶ as a matter of provocation so immediately preceding the assault as to create a fair presumption that the violence was committed under the sudden influence of passion created by it.⁷ But when the provocation has been given, and time has been afforded for the passions to cool, and time had for reflection, such provocation is no justification or palliation of a subsequent assault,⁸ though the provocation consist of words ever so irritating or provoking.⁹ If, however, the words of provocation immediately precede the act done, so as naturally to provoke the battery, they may constitute a ground for the reduction of the punishment.¹⁰ So the defendant may disprove malice in mitigation of the offense, and if he undertakes to do so, it may be shown that the de-

¹ 1 Arch. C. P. & Pl., 461; *State v. Benham*, 7 Conn., 414.

² *Rex v. Bowman*, 6 Car. & P., 101; *Rex v. Smith*, 8 B. & Cres., 341; but see *Tooke's case*, 25 How. St. T., 446.

³ *Rex v. Smith*, 8 B. & Cres., 341, 342; *Binder v. State*, 5 Iowa, 457.

⁴ *Duncan v. Com.*, 6 Dana, 295.

⁵ *State v. Smith*, 11 Ired., 33.

⁶ *Dean v. Horton*, 2 McMullan, 147.

⁷ *Coxe v. Whitney*, 9 Mis., 531; *Morely v. Dunbar*, 24 Wis., 183.

⁸ *Ellsworth v. Thompson*, 13 Wen., 658; *Willis v. Forrest*, 2 Duer, 310; *Avery v. Ray*, 1 Mass., 12; *Collins v. Todd*, 17 Mis., 537.

⁹ *Lee v. Woolsey*, 19 John., 319; *Donnelly v. Harris*, 41 Ills., 126.

¹⁰ *Corning v. Corning*, 2 Seld., 97; *Keyes v. Devlin*, 3 E. D. Smith, 518; *Cushman v. Ryan*, 1 Story, 91; *Ireland v. Elliott*, 5 Clarke Iowa, 478; *Burchard v. Booth*, 4 Wis., 67; *Donnelly v. Harris*, 41 Ills., 126.

fendant had offered to fight the other party since the commencement of the action.¹ So where the provocation grows out of a question of veracity between the parties, the defendant may show the truth of the matters in dispute was with him, to reduce the punishment.² Though former threats and insults will not palliate an assault and battery, yet if the injury is done in the attempt to prevent the execution of such threats, the fact may be shown in mitigation of the punishment.³ The defendant may show every thing which occurred at the time of the battery which is any part of the *res gestæ*.⁴ The inducement to the transaction, and all such particulars in the conduct of either party leading to the final act, forming a part of it, as seem to show what degree of blame attaches to them severally, and such acts as will aid the jury in determining the just measure of the punishment, are admissible in evidence.⁵

§ 189. **Proof of Using Offensive Words, when Inadmissible in Mitigation of the Fine.** — Evidence of opprobrious language used by the person assaulted towards the niece and the sister-in-law of the defendant was held inadmissible in palliation of the offense.⁶ So evidence of the declarations of the person assaulted respecting the defendant is not admissible unless shown to have been communicated to him.⁷ If made two months previous, they are inadmissible unless communicated to the defendant immediately before the assault.⁸ Evidence that the person assaulted was a lazy vagabond and indebted to the defendant, that the money could not be collected by legal process, and that he had just refused to work out the debt at ten dollars an hour, is not admissible for the defend-

¹ Mills v. Carpenter, 10 Ired., 298.

² Marker v. Miller, 9 Md., 338.

³ Watters v. Brown, 3 Marsh, 559; Fairbanks v. Witter, 18 Wis., 287.

⁴ 2 Greenl. Ev., § 93.

⁵ Dean v. Horton, 2 McMullan, 147.

⁶ Collins v. Todd, 17 Mis., 537; Avery v. Ray, 1 Mass., 12; Burchard v. Booth, 4 Wis., 67.

⁷ Garther v. Blowers, 11 Md., 536; Adams v. People, 47 Ills., 326.

⁸ Garther v. Blowers, 11 Md., 536.

ant in mitigation or extenuation of the assault.¹ So a provocation by another is not evidence in mitigation of the offense, though the blow aimed at him fell by accident upon the person assaulted.² Evidence of the dissolute conduct or bad character for virtue of the person assaulted is not admissible for any purpose.³ So the defendant cannot prove his good character and his usual peaceable deportment as a citizen.⁴ Where a husband is tried for an assault and battery committed on his wife, he may prove in mitigation of the fine that when he committed the offense he was provoked to do so by the misbehavior and misconduct of his wife.⁵

§ 190. **What Evidence Admissible to Increase the Punishment.**—Evidence of previous threats made by the defendant⁶ or of a preconceived intention to commit the assault,⁷ or any other evidence tending to show malice,⁸ is admissible to increase the amount of the fine. For the same purpose, evidence that the defendant is wealthy is admissible.⁹

§ 191. **Words, or a Provocation at a Different Time, not a Justification.**—No words will justify an assault and battery.¹⁰ Nor is it any justification that the plaintiff had busied herself in tattling about the defendant and his wife.¹¹ No assault, or assault and battery, or any provocation whatever, committed at

¹ *Ward v. State*, 28 Ala., 53.

² *Corning v. Corning*, 2 Seld., 97.

³ *Id.*; *McKenzie v. Allen*, 3 Strob., 546; *Givens v. Bradley*, 3 Bibb, 192.

⁴ *Drake v. Com.*, 10 B. Monr., 225.

⁵ 2 Arch. C. P. & Pl., 63; *Robbins v. State*, 20 Ala., 36.

⁶ *Sledge v. Pope*, Hayw., 402; *Ogletree v. State*, 28 Ala., 693; *Morrow v. Moses*, 8 N. H., 95; see *Adams v. People*, 47 Ills., 376; *Williams v. People*, 54 Ills., 423.

⁷ *Yoes v. State*, 4 Engl., 42.

⁸ *Aulger v. Smith*, 34 Ills., 534.

⁹ *McNamara v. King*, 2 Gilm., 432; *Watery v. Feber*, 18 Wis., 500; *Barns v. Martin*, 15 Wis., 240.

¹⁰ *State v. Wood*, 1 Bay, 351; *Stephens v. Myers*, 4 Car. & P., 349; *Keyes v. Develin*, 3 E. D. Smith, 518; *Cushman v. Ryan*, 1 Story, 91; *Winfield v. State*, 3 Greene, 339; *Donnelly v. Harris*, 41 Ills., 126; *Ogden v. Claycomb*, 52 Ills., 366; *Burchard v. Booth*, 4 Wis., 67.

¹¹ *Suggs v. Anderson*, 12 Ga., 461.

a different time, or any antecedent facts which are not parts of the same transaction, will justify or excuse an assault and battery if the defendant's passion has had time to cool before the commission of the offense.¹

§ 192. **Jurisdiction Indictment — Compromise — Evidence — Mittimus.** — Justices of the peace formerly had exclusive jurisdiction given them of an assault and battery in which the people were plaintiffs,² and their jurisdiction was not affected by the fact that the complaint charged an assault and battery with a deadly weapon,³ but under the present statute their jurisdiction is not exclusive; therefore a party may now be indicted for an assault, assault and battery, and for affrays, though under the former statute it was held that he could not be indicted for such offense in this state.⁴ The complainant in actions brought in the name of the people has no right to compromise the suit.⁵ On the trial, when it is doubtful who committed the assault and battery, evidence of the ill-will of the defendant to the person assaulted may be received as tending to show that he was the guilty person.⁶ A person in jail cannot be convicted of an assault and battery for resisting an attempt to compel him to obey the orders of the jailor, without proof by mittimus that the jailor had authority to restrain him of his liberty.⁷

§ 193. **Reception of the Verdict — Procedure where Offense is Committed in View of Justice.** — Upon conviction for an assault and battery, the verdict may be received in the absence of the defendant. Under the former statute and constitution it was held, where the offense was committed in view of the justice, he might order the defendant into custody and proceed to trial, without an affidavit or issuing a warrant.⁸

¹ *Burchard v. Booth*, 4 Wis., 67; *Collins v. Todd*, 17 Mis., 537; *Avery v. Ray*, 1 Mass., 12; *Lee v. Woolsey*, 19 John., 319.

² *Carpenter v. People*, 4 Scam., 197.

³ *Severn v. People*, 37 Ills., 414.

⁴ *Carpenter v. People*, 4 Scam., 197.

⁵ *People v. Bishop*, 5 Wen., 111.

⁶ *Jewett v. Banning*, 21 N. Y., 27; *State v. Griffis*, 3 Ired., 504.

⁷ *People v. Muldoon*, 2 Park. Cr. R., 13.

⁸ *Lancaster v. Lane*, 19 Ills., 242.

STATEMENT OF THE OFFENSE OF AN ASSAULT.

(Commence as in form on page 112) that C. D. did on, etc., at, etc., with force and arms,¹ unlawfully² attempt to strike, beat, wound and commit a violent injury on the person of the said A. B. with his fists, then and there having the present ability to commit the said violent injury" (conclude as in form on page 112).

STATEMENT OF THE OFFENSE OF ASSAULT AND BATTERY.

(Commence as in form on page 112), that C. D. on, etc., at, etc., did unlawfully³ beat, bruise, wound and assault him the said A. B. with a club, and did then and there violently⁴ and maliciously strike the right eye of him the said A. B. and put out the same⁵ (conclude as in form on page 112).

§ 194. Punishment. — "Whoever shall be guilty of an assault or an assault and battery, shall be fined not less than three nor more than one hundred dollars."⁷

¹ These words are proper, but not necessary. 1 Chitty Cr. L., 240; Id., 172, n. 3; 2 Arch. C. P. & Pl., 52.

² The word "unlawfully" is necessary in an indictment, because used in the statute describing the offense. 1 Chitty Cr. L., 381; Curtis v. People, Breese, 199, 2d Ed., 256; but see Perry v. People, 14 Ills., 496.

³ In Iowa an affidavit which charged that the defendant "committed an assault upon him the deponent in the county of Dubuque," etc., was held sufficient. State v. Douglass, 1 Iowa, 550.

⁴ The indictment or complaint need not state that the assault was made willfully. State v. Bray, 1 Mo., 180.

⁵ Charging the act to have been "done riotously and in a violent and tumultuous manner" does not make the charge one for an unlawful assembly or riot; nor does it unite two distinct offenses. State v. McClintock, 8 Iowa, 203.

⁶ An indictment which charges that the defendant did on, etc., at, etc., "in and upon one D., with force and arms make an assault, and him the said D. did then and there beat, wound and ill treat, and do other wrongs and injuries," etc., does not charge two offenses. State v. Twogood, 7 Iowa, 252.

⁷ R. S., 355, § 22.

SECTION III.

MISCELLANEOUS OFFENSES WHICH MAY BE TRIED BEFORE A
JUSTICE OF THE PEACE.

- § 195. Provisions of the Statute Relating to Affrays.
- 196. Evidence in a Case of an Affray.
- 197. Conviction for an Assault and Battery.
- 198. Provisions of the Statute Relating to an Unlawful Assembly
- 199. Continued.
- 200. Refusing to Join Posse.
- 201. Keeping Open Tippling House on Sunday.
- 202. Definition of Sunday.
- 203. Disturbing the Peace of Society on Sunday.
- 204. Disturbing the Peace of the Family on Sunday
- 205. Disturbing the Peace.
- 206. Lewdness, etc.
- 207. Continued—Public Indecency.
- 208. Continued—Indecent Exposure.
- 209. Disorderly House—Ill Fame.
- 210. Continued—Jurisdiction of Justice.
- 211. Evidence—Character of the House.
- 212. Continued—Reputation.
- 213. What Evidence Inadmissible.
- 214. Variance.
- 215. What not a Defense.
- 216. Who Liable.
- 217. Evidence that Defendant Kept the House.
- 218. Evidence that the House was Disorderly.
- 219. Lessor of House of Ill Fame, when Liable.
- 220. Disturbing Religious Meetings.
- 221. Disturbing Camp and Field Meetings.
- 222. Disturbing Schools, etc.
- 223. Disturbing a Funeral.
- 224. Evidence Required to Convict—The Meeting.
- 225. Continued—What a Disturbance.
- 226. Provisions of the Statute Relating to Gaming.
- 227. What a Valuable Thing within the Meaning of the Statute.
- 228. Who Liable.
- 229. Variance.
- 230. Recovery of Losses by Gaming.

231. Premises Liable for Losses.
232. Enumerated Cases held to be within the Statute Relating to Betting
233. Barratry.
234. Continued—Bill of Particulars.
235. Who Guilty of Barratry.
236. Number of "Suits or Quarrels" Necessary.
237. Jurisdiction—Attorney.
238. Maintenance.
239. Evidence of Officiously Intermeddling.
240. Evidence of Want of Interest.
241. Evidence of Intermeddling to Promote Litigation.
242. Champerty.
243. Compounding Crime.
244. Jurisdiction.
245. Rule at Common Law and under the Statute as to Compounding Crimes.
246. What a Compounding of a Crime.
247. Evidence.
248. Assuming a Corporate Name.
249. Refusing to Allow Prisoner to See Counsel.
250. Selling Poisonous Drugs without being Labeled.
251. Selling, etc., Poisonous Drugs without Keeping a Record.
252. Drunkenness.
253. Continued—Of Officer.
254. Officer not Trying to Prevent a Duel.
255. Officer Neglecting to Suppress an Unlawful Assembly of Twelve or more Persons.
256. Illegal Fees.
257. Continued—Private Remedy.
258. Intimidation of Workmen, etc.
259. Advertising Lotteries.
260. Evidence.
261. Vagabonds.
262. Continued—Conviction before a Justice.
263. Dram Shop Defined.
264. Penalty for Selling Liquor without License.
265. How License may be Granted.
266. Form of License—Rights Under—May be Revoked
267. Bond—How Taken—Suit on.
268. Selling or Giving to a Minor or Drunkard.
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1. AFFRAYS.

§ 195. Provisions of the Statute Relating to Affrays. — “If two or more persons shall by agreement fight in a public place, to the terror of the citizens of the state, the persons so offending shall be deemed guilty of an affray, and severally fined not exceeding one hundred dollars.”¹

STATEMENT OF THE OFFENSE OF AN AFFRAY.

(Commence as in form on page 112) that C. D. and E. F.,² on, etc., at,³ etc., in a public place,⁴ to wit., in a public street and highway there situate,⁵ did by agreement⁶ unlawfully fight together,⁷ to the terror of the citizens of this state” (conclude as in form on page 112).

¹ R. S., 390, § 250.

² It is necessary to allege that not less than two persons committed the offense. R. S., 390, § 250; *Simpson v. State*, 5 Yerg., 356; *State v. Priddy*, 4 Humph., 429.

³ The words “with force and arms,” R. S., 408, § 411, “being unlawfully assembled,” and “arrayed in a warlike manner,” are unnecessary, and should be omitted. 2 Bish. Cr. P., §§ 22, 23; *State v. Priddy*, 4 Humph., 429.

⁴ An averment that the place of fighting was a public place, is necessary. *State v. Priddy*, 4 Humph., 429; *State v. Heiflein*, 8 Humph., 84; but the statement that it was in a certain street and highway is sufficient; 2 Bish. Cr. P., § 20.

⁵ The words “to wit., in a public street and highway there situate” may be omitted. *State v. Benthall*, 5 Humph., 519.

⁶ The words “by agreement,” being in the statute, are necessary. R. S., 390, § 250.

⁷ In Indiana it was held to be necessary to insert in an indictment the word “together” after the word “fight.” *State v. Vanloan*, 8 Ind., 182; but this word is omitted in our statute, and probably an averment in the language of the statute would be sufficient; *ante* p. 36, n. 5.

⁸ The words “did make an affray” do not sufficiently charge the offense.

§ 196. **Evidence.** — The prosecution must prove, in order to convict the defendants of an affray: 1. *An agreement to fight*;¹ 2. *That there was an affray or fighting*; 3. *That it was in a public place*; 4. *That it was to the terror of the citizens of this state*; 5. *That two or more persons were engaged*.² Those who only defend themselves against an illegal assault,³ or do not make any resistance to an attack made upon them,⁴ or do not consent or agree to fight, are not guilty of an affray. In proof of the fighting, there must be a stroke given or a weapon drawn⁵ and acts done equivalent to an assault.⁶ Mere words do not constitute an affray.⁷ Where a field is surrounded by a forest, situated one mile from any highway, it does not lose its private character by the casual presence of three persons so as to make those who fought there by agreement guilty of an affray.⁸ So where it appeared by the evidence that two of the prisoners fought in the midst of a great crowd of persons, it was held that the place was a private one, and therefore that there was no affray.⁹ But an inclosed lot ninety feet from the street, from which it is visible, is a public place in which an affray may be committed.¹⁰ It is not necessary to show that any other terror was actually produced than the law will infer from the fighting.¹¹ In another state

Simpson v. State, 5 Yerg., 356; State v. Priddy, 4 Humph., 429; State v. Vanloan, 8 Ind., 182; State v. Woody, 2 Jones N. C., 335; State v. Simmons, 5 Strob., 53; *contra*, State v. Washington, 19 Texas, 128; State v. Benthall, 5 Humph., 519.

¹ R. S., 390, § 250.

² Id.; 2 Arch. C. P. & Pl., 945; Simpson v. State, 5 Yerg., 356.

³ Lewis Cr. L., 63.

⁴ O'Neill v. State, 16 Ala., 65; *contra*, State v. Perry, 5 Jones N. C., 9.

⁵ 3 Inst., 158; 4 Black. Com., 145; 2 Arch. C. P. & Pl., 947; Simpson v. State, 5 Yerg., 365; Hawkins v. State, 13 Ga., 322; *contra*, 1 Russ. on C., 292; State v. Summer, 5 Strob., 53.

⁶ 2 Bish. Cr. L., § 3; Hawkins v. State, 13 Ga., 322; O'Neill v. State, 16 Ala., 65.

⁷ 2 Bish. Cr. L., § 3; O'Neill v. State, 16 Ala., 65.

⁸ Taylor v. State, 22 Ala., 15.

⁹ Hunt's Case, 1 Cox C. C., 177.

¹⁰ Carwile v. State, 35 Ala., 392.

¹¹ 2 Bish. Cr. L., § 4; State v. Summer, 5 Strob., 53.

it has been held that one defendant may be convicted and the others acquitted,¹ but in this state two or more persons must be guilty or under our statute there is no affray.² A person who aids and abets an affray is guilty as a principal.³

§ 197. **Conviction for an Assault and Battery.** — One or more of the defendants may be acquitted on the charge of an affray, and be convicted of an assault and battery, provided the complaint or affidavit contains allegations sufficient to charge such offense;⁴ but if the affidavit does not contain allegations sufficient to charge the offense of an assault and battery, there can be no conviction for that offense.⁵

2. UNLAWFUL ASSEMBLY.

§ 198. **Provisions of the Statute Relating to an Unlawful Assembly.** — “If two or more persons assemble together to do an unlawful act, and separate without doing or advancing toward it, such persons shall be deemed guilty of an unlawful assembly, and be severally fined, not exceeding one hundred dollars.”^f

STATEMENT OF THE OFFENSE OF AN UNLAWFUL ASSEMBLY.

(*Commence as in form on page 112*) that C. D. and E. F., on, etc., at, etc., did unlawfully and willfully assemble together to do an unlawful act, *to wit.*, to pull down and remove a certain dwelling-house in the possession of the said A. B., and having so assembled, did separate without doing or advancing towards doing the said unlawful act (*conclude as in form on page 112*).

§ 199. **Continued.** — “If two or more persons assemble for the purpose of disturbing the public peace, or committing any unlawful act, and do not disperse on being desired or commanded so to do by a judge, justice of the peace, sheriff, coro-

¹ Lewis Cr. L., 74; Carlin v. State, 4 Yerg., 143; Cash v. State, 2 Tenn. R., 198; 2 Overt, 198.

² R. S., 390, § 250; Hawkins v. State, 13 Ga., 322.

³ Hawkins v. State, 13 Ga., 322; Carlin v. State, 4 Yerg., 143.

⁴ State v. Allen, 4 Hawks, 356; Cash v. State, 2 Tenn., 198.

⁵ 2 Bish. Cr. P., § 25; Com. v. Perdue, 2 Va., Cas., 227.

^f R. S., 390, § 251.

ner, constable, or other public officer, the persons so offending shall be severally fined, not exceeding two hundred dollars.”¹

STATEMENT OF THE OFFENSE OF AN UNLAWFUL ASSEMBLY—REFUSING TO DISPERSE.

(Commence as in form on page 112,) that C. D. and E. F. (*add, if true, “and divers other persons to the said A. B. unknown”*), on, etc., at, etc., in the county aforesaid, did unlawfully and riotously assemble and gather together for the purpose of doing an unlawful act, *to wit.*, for the purpose of assaulting and beating the said A. B., and the said C. D. and E. F. (*and divers other persons*) and each of them, being then and there so assembled and gathered together, then and there did not disperse on being then and there, while being so assembled and gathered together as aforesaid, desired and commanded so to do by one J. S., then and there a constable of the said county, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

3. REFUSING TO JOIN POSSE.

§ 200. Provisions of the Statute Relating — Refusing to Join Posse. — “Every male person above eighteen years of age, who shall neglect or refuse to join the *posse comitatus* or power of the county, by neglecting or refusing to aid and assist in taking or arresting or securing any person against whom there may have issued any civil or criminal process, or by neglecting or refusing to aid and assist in retaking or securing any person who, after having been arrested or confined, may have escaped from such arrest or imprisonment, or by neglecting or refusing to aid and assist in preventing any breach of the peace, or the commission of any criminal offense, being thereto lawfully required by any sheriff, deputy sheriff, coroner, constable, judge or justice of the peace, or other officer concerned in the administration of justice, shall be fined not less than ten dollars nor more than fifty dollars.”²

¹ R. S., 390, § 252.

² Id., 389, § 245.

STATEMENT OF THE OFFENSE OF REFUSING TO JOIN POSSE.

(*Commence as in form on page 112*) that C. D., being a male person above eighteen years of age, on, etc., at, etc., did neglect or refuse to join the *posse comitatus* and power of the county by then and there neglecting and refusing to aid and assist in taking, arresting, and securing E. F., against whom there was then issued a criminal process, the said C. D., being then and thereto lawfully required¹ by G. H., then and there a constable of the said county, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

4. KEEPING OPEN TIPPLING HOUSE ON SUNDAY.

§ 201. Provisions of the Statute. — “Whoever keeps open any tippling house, or place where liquor is sold or given away, upon the first day of the week, commonly called Sunday, shall be fined not exceeding two hundred dollars.”²

§ 202. Definition. — “Sunday shall include the time from midnight to midnight.”³

STATEMENT OF THE OFFENSE OF KEEPING OPEN TIPPLING HOUSE ON SUNDAY.

(*Commence as in form on page 112*) that C. D. upon the first day of the week, commonly called Sunday, *to wit.*, on the — day of —, A. D. 18—, at the town of — in said county, did unlawfully keep open a tippling house, a place where liquor was then and there sold (or given away), contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

5. DISTURBING THE PEACE OF SOCIETY ON SUNDAY.

§ 203. Provisions of the Statute. — “Whoever disturbs the peace and good order of society by labor (works of necessity)⁴

¹ It has been held that an indictment at common law for refusing to assist an officer in securing a person whom he had arrested, was not sufficient when it merely alleged the arrest to have been made by “lawful authority.” The authority to arrest should have been set forth. *State v. Shaw*, 3 Ired., 20, 22.

² R. S., 391, § 259.

³ *Id.*, § 260.

⁴ A work of necessity does not mean a physical necessity. *Com. v. Knox*, 6 Mass., 76. It is a work of necessity to boil sap on Sunday to prevent it from running to waste. *Whitcomb v. Gilman*, 35 Vt., 297; *Morris v. State*, 31 Ind., 189; see also *Crocket v. State*, 33 Ind., 416.

and charity excepted), or by any amusement or diversion on Sunday, shall be fined not exceeding twenty-five dollars. This section shall not be construed to prevent watermen and railroad companies from landing their passengers, or watermen from loading and unloading their cargoes, or ferrymen from carrying over the water travelers and persons moving their families on the first day of the week, nor to prevent the due exercise of the rights of conscience by whomever thinks proper to keep any other day as a sabbath.”¹

STATEMENT OF THE OFFENSE OF SABBATH BREAKING.

(Commence as in form on page 112) that C. D. upon the first day of the week, commonly called Sunday, *to wit.*, on the — day of —, A. D. 18—, at the town of — in said county, did knowingly and willfully disturb the peace and good order of society by labor, *to wit.* (insert what he did), the said labor then and there not being a work of necessity or charity, contrary to the form of the statute in such case made and provided (conclude as in form on page 112).

6. DISTURBING THE PEACE OF THE FAMILY ON SUNDAY.

§ 204. Provisions of the Statute. — “Whoever shall be guilty of any noise, rout or amusement on the first day of the week, called Sunday, whereby the peace of any private family may be disturbed, shall be fined not exceeding twenty-five dollars.”²

STATEMENT OF THE OFFENSE OF DISTURBING FAMILY ON SUNDAY.

(Commence as in form on page 112) that C. D., on the first day of the week, commonly called Sunday, *to wit.*, on the — day of —, A. D. 18—, at the town of — in said county, was guilty of making a great noise by blowing a horn, and screaming and talking with a loud voice, whereby the peace of A. B. and his family was then and there disturbed, contrary to the form of the statute in such case made and provided (conclude as in form on page 112).

¹ R. S., 391, § 261.

² Id., 392, § 262.

7. DISTURBING THE PEACE.

§ 205. **Provisions of the Statute.** — “Whoever, at a late and unusual hour of the night-time, willfully and maliciously disturbs the peace and quiet of any neighborhood or family,¹ by loud or unusual noises, or by tumultuous or offensive carriage, threatening, traducing, quarreling, challenging to fight or fighting, or whoever shall carry concealed weapons, or in a threatening manner display any pistol, knife, slung-shot, brass, steel, or iron knuckles or other deadly weapon, day or night, shall be fined not exceeding one hundred dollars.”²

STATEMENT OF THE OFFENSE OF DISTURBING THE PEACE.

(*Commence as in form on page 112*) that C. D., on, etc., at a late and unusual hour of the night-time, at, etc., in said county, did willfully and maliciously disturb the peace and quiet of the neighborhood and family of the said A. B. by loud and unusual noises, made by blowing horns, firing guns,³ screaming and talking in a loud and unusual manner, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

8. LEWDNESS, EXPOSURE OF THE PERSON AND OTHER ACTS OF INDECENCY.

§ 206. **Provisions of the Statute.** — “Whoever shall be guilty of open lewdness, disorderly conduct, or other notorious act of public indecency tending to debauch the public morals, shall be fined not exceeding two hundred dollars.”⁴

STATEMENT OF THE OFFENSE OF AN INDECENT EXPOSURE OF THE PERSON.

(*Commence as in form on page 112*) that C. D., on, etc., at, etc., in the said county, in a public⁵ street, was guilty of a notorious act of indecency tend-

¹ A woman occupying a dwelling-house alone is as much entitled to the protection of the statute as if surrounded by children or friends. *Noe v. People*, 39 Ills., 96.

² R. S., 360, § 56.

³ It has been held that the way and manner in which the loud and unusual noises were made should be stated. *Whitesides v. People*, Breese, 4, 2d Ed., 21.

⁴ R. S., 360, § 55; *Mayer v. Schleichter*, 29 Wis., 646.

⁵ It is sufficient to allege that the exposure was “to the public view in a public place.” *State v. Roper*, 1 Dev. & Bat., 208.

ing to debauch the public morals,¹ by then and there, with intent² to corrupt and debauch the morals of the people, exhibiting and exposing his private parts for a long time, *to wit.*, for the space of one hour in the presence and sight³ of divers persons, male and female, then and there passing and repassing⁴ (*conclude⁵ as in form on page 112*).

§ 207. Lewdness — Public Indecency. — A person may be guilty of open lewdness by frequenting houses of ill-fame,⁶ by putting his arms openly around a woman, etc., by lying in bed with a woman not his wife in the presence of others;⁷ or, if a female, by making indecent advances to a man. But a secret familiarity in a room, the doors and blinds being shut, only seen through a broken pane of glass, is not an open lewdness within the meaning of the statute.⁸ The indecent and public exposure of one's person or the person of another,⁹ the publication of obscene books and prints, the utterance of obscene words, the singing of obscene songs,¹⁰ the exhibition of a monster,¹¹ and the public sel-

¹ In another state it has been held not sufficient to charge the offense in the general words of the statute. Whart. Cr. L., § 2394; *Cameron v. State*, 8 Miss., 494.

² It is proper, if not necessary, that the intent should be specially stated. *Miller v. People*, 5 Barb., 203; *Com. v. Haynes*, 2 Gray, 72; but see *ante* § 46, n. k.

³ It is not necessary to allege that the prisoner was seen by citizens. If they could have seen him it is sufficient. *State v. Roper*, 1 Dev. & Bat., 208; *State v. Millard*, 18 Vt., 574.

⁴ In charging the offense of lewdness by frequenting houses of ill-fame, it must be alleged that the defendant, knowing the house to be a house of ill-fame, did openly and notoriously haunt and frequent the same. *State v. Moore*, 1 Swan Tenn., 136; *Brooks v. State*, 2 Yerg., 482; *contra*, *State v. Eagle*, 2 Humph., 414.

⁵ It is not necessary to conclude "to the common nuisance." *Com. v. Haynes*, 2 Gray, 72.

⁶ 4 Black. Com., 64; *Brooks v. State*, 2 Yerg., 482.

⁷ 2 Whart. Cr. L., § 2396, and notes.

⁸ *Com. v. Catlin*, 4 Mass., 8.

⁹ *Britan v. State*, 3 Humph., 203; *State v. Roper*, 1 Dev. & Bat., 208; *Reg. v. Webb*, 1 Den. C. C., 338; 2 C. & K., 933; *Temp. & M.*, 23; 13 Jur., 42; *State v. Rose*, 32 Mo., 560.

¹⁰ *Com. v. Holmes*, 17 Mass., 336; *Com. v. Sharpless*, 2 Serg. & R., 91; *contra*, *McJunks v. State*, 10 Ind., 140.

¹¹ *Harring v. Walrond*, 2 Cha. Ca., 110.

ling and buying of a wife,¹ are probably such notorious acts of indecency, tending to debauch the public morals, as may be punished under the statute.

§ 208. **Indecent Exposure.** — An indecent exposure must be in a public place² or where it may be seen.³ A place fixed for making urine out of sight except of those who enter it, is not,⁴ but an omnibus⁵ or a roof of a house, not visible from the street, but visible from the back windows of other houses,⁶ is a place where the offense may be committed. Where two persons went out in their back yard with nothing but their shirts on, and were only seen by a man and his wife, it was held that it was a question of fact whether there was an intentional, wanton and indecent exposure of the persons of the defendants at such a time and place as to offend against public decency.⁷ The letting of a stallion to mares in sight of the street,⁸ or in a city,⁹ where persons, male and female, are passing and repassing, or undressing and bathing in the sight of a dwelling¹⁰ is such an act of indecency as may be punished as a crime. It has been held that the indecent exposure of a person to only one woman is not a criminal offence,¹¹ but the better opinion is that the intentional exposure of one's private parts to a virtuous woman is an aggravated criminal offense, which may be punished under the statute.¹²

¹ *Rex v. Deleval*, 3 Bur., 1434, 1438.

² 1 Bish. Cr. L., § 1128; *Reg. v. Orchard*, 3 Cox C. C., 248; 20 Eng. L. & Eq., 598; *Reg. v. Holmes Dears*, 207, 3 Car. & P., 360; 20 Eng. L. & Eq., 597; *Reg. v. Thallman*, 1 Leigh & C., 326.

³ *Com. v. Sharpless*, 2 Serg. & R., 91; *State v. Roper*, 1 Dev. & Bat., 208; *State v. Millard*, 18 Vt., 574.

⁴ *Rex v. Orchard*, 3 Cox C. C., 348; 20 Eng. Law & Eq., 598; *Reg. v. Harris* Law R. C. C., 282.

⁵ *Rex v. Holmes*, 20 Eng. Law & Eq., 597.

⁶ *Reg. v. Thallman*, 1 Leigh & C., 326.

⁷ *Miller v. People*, 5 Barb., 203.

⁸ *Crane v. State*, 3 Ind., 193.

⁹ Whart. Cr. L., 2397; *Nolm v. Mayor*, 4 Yerg., 163.

¹⁰ *Rex v. Cumden*, 2 Campb., 89.

¹¹ *R. v. Watson*, 2 Cox C. C., 376; 20 Eng. L. & Eq., 599; *Rex v. Web*, 3 C. & K., 933; *Reg. v. Thallman*, 1 Leigh & C., 326.

¹² *State v. Millard*, 18 Vt., 574.

9. DISORDERLY HOUSE--ILL-FAME.

§ 209. **Provisions of the Statute.**—"Whoever keeps or maintains a house of ill-fame or place for the practice of prostitution or lewdness, or whoever patronizes the same, or lets any house, room or other premises for any such purpose, or shall keep a common, ill-governed and disorderly house, to the encouragement of idleness, gaming, drinking, fornication or other misbehavior, shall be fined not exceeding two hundred dollars. When the lessee or keeper of a dwelling-house or other building is convicted under this section, the lease or contract for letting the premises shall, at the option of the lessor, become void, and the lessor may have the like remedy to recover the possession as against a tenant holding over after the expiration of his term. And whoever shall lease to another any house, room or other premises, in whole or part, for any of the uses or purposes finable under this section, or knowingly permit the same to be so used or occupied,¹ shall be fined not exceeding two hundred dollars, and the house or premises so leased, occupied or used shall be held liable for and may be sold for any judgment obtained under this section, but if such building or premises belong to a minor or other person under guardianship, then the guardian or conservator and his property shall be liable instead of such ward, and his property shall be subject to be sold for the payment of said judgment."²

§ 210. **Jurisdiction of Justice.** — Under the preceding section of the statute it may be a question not free from doubt whether a justice of the peace has jurisdiction to try the offense of keeping a disorderly house or a house of ill-fame, for the reason that as an incident to the conviction, the lease

¹ Where the defendant leased a house for a legal and proper purpose, not knowing it was to be used for an illegal purpose, and after the lease was executed, the lessees kept a place of prostitution and lewdness of which illegal use the defendant had knowledge, but took no means to prevent the same, it was held that he was not liable on an indictment under the statute. *Abrams v. State*, 4 Iowa, 542; 6 Iowa, 117.

² R. S., 360, § 57.

of the keeper of the premises is forfeited in addition to the fine, not exceeding two hundred dollars. In the absence of any decision of the courts upon the question in this state, we think the forfeiture of the lease is only an incident to the conviction and not a punishment within the meaning of the statute, giving the justice jurisdiction, and therefore that a justice of the peace has jurisdiction in these cases.¹

STATEMENT OF THE OFFENSE OF KEEPING A HOUSE OF ILL-FAME.

(Commence as in form on page 112) that C. D., on the — day of —, A. D. 18—, and on divers other days and times between that time and the present time, at the town² of — in the county aforesaid, unlawfully and wickedly did and still does keep and maintain a house of ill-fame and place for the practice of prostitution, fornication and lewdness, to the encouragement of idleness, fornication and other misbehavior, and did then and³ on said other days and times, and there permit and procure for filthy lucre and gain⁴ divers evil-disposed persons,⁵ as well men as women, and common prostitutes to resort there and commit whoredom and fornication to the common nuisance of all the people (conclude as in form on page 112).

§211. Evidence — Character of the House. — The prosecutor must prove 1. *That the defendant either held himself or herself out as the keeper of⁶ or kept the house alleged to have been a house of ill-fame by direct evidence;*⁷ 2. *That such house*

¹ R. S., 405, §381.

² According to some of the authorities the offense is local and must be described as committed in a particular town. *State v. Nixon*, 18 Vt., 70; *Norris v. House*, 3 Greene Iowa, 513; *contra*, 2 Bish. Cr. P., §111; *Zumoff v. State*, 4 Greene Iowa, 526; *State v. Crogan*, 8 Iowa, 23; *State v. Shaw*, 35 Iowa, 575; *State v. Winsfraud*, 37 Iowa, 110.

³ An indictment which avers that the defendant unlawfully kept and maintained a house of ill-fame, resorted to for the purpose of prostitution and lewdness, is sufficient without alleging that the house was resorted to by divers persons, men as well as women. *Com. v. Ashley*, 2 Gray, 356; *State v. Homer*, 40 Me., 438.

⁴ The words "for filthy lucre and gain" may be omitted. *Com. v. Ashley*, 2 Gray, 356; *Com. v. Wood*, 97 Mass., 225; *State v. Nixon*, 18 Vt., 70; *State v. Bailey*, 1 Fost., 345.

⁵ It is not necessary to state the names of the persons frequenting the house. 2 Bish. Cr. P., §107; *State v. Patterson*, 7 Ired., 70.

⁶ *State v. Hand*, 7 Iowa, 411.

⁷ 2 Bish. Cr. P., §118; *State v. McDowell*, *Dudley S. C.*, 346; *State v. Eru-nell*, 29 Wis., 435.

was a house of ill-fame. The character of the house may be shown by circumstances, such as that the accused, if a woman, was a prostitute,¹ or that the women kept by the defendant were common prostitutes or were reputed to be such;² that notoriously reputed prostitutes and libertines,³ persons of bad repute, old and young, male and female, black and white, were in the habit of frequenting the house day and night;⁴ that actual lewd behavior took place in the house;⁵ that fighting and other disturbance of the peace occurred in the house, to the annoyance of the neighborhood;⁶ that there has been repeated arrests of girls at the prisoner's house on the charge of being prostitutes; that such prisoner procured bail for them; that such arrests were made at late hours in the night; and that women before convicted were frequently found at the defendant's house.⁷ Evidence that the defendant procured a woman from a distance under peculiar circumstances was held admissible.⁸ Even the refusal of witnesses who have frequented the house to answer questions in reference to the conduct of the inmates and visitors while there, on the ground that they would degrade themselves by their answers, was in one case deemed to be a matter which might be taken into the consideration of the jury.⁹

§ 212. *Continued — Reputation.*— It has been held that evidence that the house was reputed to be a lewd or bawdy house is admissible.¹⁰ Under a statute somewhat similar to ours, using

¹ *State v. McDowell*, Dudley S. C., 346.

² *Harwood v. People*, 26 N. Y., 192.

³ *State v. McGregor*, 41 N. H., 407, 413; *Gregg v. Bendeno*, Ellis, B. & B., 133; *Com. v. Gannett*, 1 Allen, 7; *Harwood v. People*, 26 N. Y., 192; *State v. Brunell*, 29 Wis., 435.

⁴ *Com. v. Sewart*, 1 Serg. & R., 342; *U. S. v. Nalor*, 4 Cranch, 372; *State v. Foley*, 45 N. H., 466.

⁵ 2 Atk., 339; *State v. Patterson*, 7 Ired., 70; *Clementine v. State*, 14 Mo., 112; *State v. Brunell*, 29 Wis., 435.

⁶ *Clementine v. State*, 14 Mo., 112; *People v. Cary*, 4 Park. C. R., 232.

⁷ *Harwood v. People*, 26 N. Y., 190.

⁸ *State v. McGregor*, 41 N. H., 407.

⁹ *Clementine v. State*, 14 Mo., 112.

¹⁰ *State v. McDowell*, Dudley S. C., 346, 349; *State v. Hand*, 7 Iowa, 411; *State v. Brunell*, 29 Wis., 435.

the words "keeping a house of ill-fame, resorted to for the purpose of prostitution or lewdness," the court held that by force of these words it was both permissible and necessary to prove the reputation of the house, also to prove it to be in fact a bawdy house.¹ Yet there is authority for saying that evidence of the reputed character of the house is incompetent.² The character of the defendant,³ of those frequenting the house, or of the women kept by the accused, may be shown to be that of libertines or prostitutes by reputation alone;⁴ and evidence of particular instances of illicit intercourse is not indispensably necessary,⁵ though such evidence may be given,⁶ even if the names of the persons behaving disorderly are neither stated in the indictment or complaint⁷ nor proved.

§ 213. **What Evidence Inadmissible.** — Evidence that the neighbors generally complained of the disturbance is inadmissible⁸ against the defendant. Mere conversations of men after coming out of the house, and not in the presence of the keeper, are inadmissible against the keeper, being in the nature of simply hearsay evidence.⁹

§ 214. **Variance.** — Where the house is described as being in a particular town or place, this, being a matter of description, must be proved as laid.¹⁰

§ 215. **What Not a Defense.** — It is no defense to show that there was not any indecency or disorderly conduct of any sort

¹ *Caldwell v. State*, 17 Conn., 467.

² 2 Bish. Cr. P., 114.

³ *State v. Brunell*, 29 Wis., 435.

⁴ 2 Bish. Cr. P., § 112; *U. S. v. Gray*, 2 Cranch C. C., 675; *Clementine v. State*, 14 Mo., 112; *Com. v. Kimball*, 7 Gray, 328; *Com. v. Gannett*, 1 Allen, 7; *contra*, *U. S. v. Jordan*, 4 Cranch C. C., 358.

⁵ *U. S. v. Stevens*, 4 Cranch C. C., 41; *State v. McDowell*, *Dudley S. C.*, 346.

⁶ 2 Atk., 339; *State v. Patterson*, 7 Ired., 70.

⁷ 2 Bish. Cr. P., § 107; *J. Anson v. Stewart*, 1 T. R., 754.

⁸ *Com. v. Stewart*, 1 Serg. & R., 343; *Com. v. Hopkins*, 2 Dana, 418; *Rex v. Rogers*, 1 B. & C., 272.

⁹ *Com. v. Harwood*, 4 Gray, 41.

¹⁰ *Roscoe Cr. Ev.*, 796; *State v. Crogan*, 8 Iowa, 523.

visible from the exterior of the house¹ or that the neighborhood has not been disturbed.²

§ 216. **Who Liable.**—A married woman is punishable, either alone³ or jointly,⁴ with her husband for this offense, and the husband will be liable though the wife owns the house and furniture and controls and manages it.⁵ There must be a keeping of a house, therefore being a common bawd and procuring unmarried women to meet and commit fornication is not such a criminal offense as can be punished under this section of the statute.⁶ But a lodger who keeps only a single room for use of a bawdery is liable for keeping a house of ill-fame.⁷ Yet it has been held that if she is simply a woman of loose morals herself and lives alone, and admits one man or many to illicit intercourse with her, she does not keep a bawdy house; for it is said that more women than one must live or resort together to make such a house.⁸ The better opinion is that under our statute a house occupied by only one prostitute may become sufficiently famous to make the keeper of it liable for keeping a house of ill-fame.⁹

STATEMENT OF THE OFFENSE OF KEEPING A DISORDERLY HOUSE.¹⁰

(Commence as in form on page 112) that C. D., on the — day of —, A. D. 18—, and on divers¹¹ other days and times between that day and the

¹ Reg. v. Rice, Law Rep. C. C., 21.

² Com. v. Gannett, 1 Allen, 7.

³ Williams' Case, 1 Salk, 383; State v. McGregor, 41 N. H., 407; Com. v. Harrington, 3 Pick., 29; Com. v. Lewis, 1 Met., 151.

⁴ Reg. v. Williams, 10 Mod., 63; State v. Bentz, 11 Mo., 27; Com. v. Lewis, 1 Met., 151.

⁵ Com. v. Wood, 97 Mass., 225.

⁶ 1 Bish. Cr. L., § 1035; Reg. v. Pierson, 1 Salk, 387; 2 Ld. Raym., 1197.

⁷ Reg. v. Pierson, 1 Salk, 382, 2 Ld. Raym., 1197.

⁸ State v. Evans, 5 Ired., 603.

⁹ R. S., 360, § 57; Caldwell v. State, 17 Conn., 467.

¹⁰ An indictment charging the defendant with keeping a disorderly house and unlawfully procuring for his filthy lucre and gain men and women of evil name and fame to frequent it at unlawful times, permitting them there to be and remain drinking, tippling and misbehaving themselves, to the great damage and common nuisance of all liege citizens in Pennsylvania, was held to be sufficient. Com. v. Stewart, 1 Serg. & R., 342.

¹¹ An allegation that the party kept such house on a day specified, and on divers other days and times, etc., is sufficient. Whart. Cr. L., § 2386.

making of this affidavit at, etc., in the county aforesaid, unlawfully¹ did² keep and maintain a certain common, ill-governed and disorderly house to the encouragement of idleness, gaming, drinking, fornication³ and other misbehavior;⁴ and unlawfully and willingly did cause and procure certain evil-disposed persons, as well men as women, of evil name, fame and conversation, to come together on the days and times aforesaid, in the said house for his own gain and lucre; and unlawfully did permit the said persons in the said house at unlawful times, as well in the night as in the day-time, on the days and times aforesaid, there to be and remain drinking, tippling, cursing, swearing, quarreling, and otherwise misbehaving, to the great injury and common nuisance⁵ of the people of this state (*conclude as in form on page 112*).

EVIDENCE OF KEEPING A DISORDERLY HOUSE.

§ 217. 1. It Must be Shown that the Defendant Kept the House.⁶
— This cannot be shown by reputation alone,⁷ but is sufficient to show that the defendant held himself or herself out or acted

¹ It is sufficient to charge the offense to have been committed "unlawfully" without saying "knowingly" or "corruptly," 2 Whart. Cr. L., § 2386.

² In Massachusetts, under the statute of that state, somewhat similar to ours, it was held that it was sufficient to charge the offense substantially in the language of the statute, without alleging that the house was resorted to by divers persons, men as well as women, or that the defendant kept it for lucre. *Com. v. Ashley*, 2 Gray, 356; *State v. Bailey*, 1 Fost., 343; *Com. v. Pray*, 13 Pick., 359.

³ It is no objection to an indictment for keeping a disorderly house that it is charged in the same count that it is kept as a bawdy house, a tippling house and a dance house; and it is not necessary under such a count to prove that all of such offenses were committed, but the defendant should be convicted if it is shown that either was permitted under such circumstances as to make the house disorderly and a nuisance. *People v. Carey*, 4 Park. Cr. R., 238; *Com. v. Kimball*, 7 Gray, 328; *Com. v. O'Kelly*, 7 Gray, 332; 13 Gray, 26.

⁴ Probably all after the word "misbehavior" usually inserted in a common-law indictment is unnecessary. *Vanderworker v. State*, 13 Ark., 700; *Rex v. Roger*, 1 B. & C., 272; *Com. v. Pray*, 13 Pick., 359; *Rex v. Higginson*, 2 Bur., 1232; *Rex v. Dixon*, 10 Mod., 335; 1 T. R., 754; *ante* page 36, note 5; *contra*, *Frederick v. Com.*, 4 B. Monr., 7; *Com. v. Stewart*, 1 Serg. & R., 342; *Com. v. Davenport*, 2 Allen, 299; *Com. v. Crupper*, 3 Dana, 466.

⁵ It has been held that the conclusion must be to the common nuisance. *Hunter v. Com.*, 2 Serg. & R., 298; *Com. v. Stewart*, 1 Serg. & R., 342.

⁶ 2 Bish. Cr. P., § 278.

⁷ *Id.*, § 118.

as keeper.¹ It is immaterial in whom the title to the premises is.² The question is whether the defendant 'did or did not keep the house, on which circumstantial³ or other evidence may be received for⁴ or against the defendant.

§ 218. 2. It Must be Shown that the House was Disorderly. — Anything done in or about the house which tends to show this, is admissible. As that the defendant kept an open house for selling spirituous liquors, and that such spirituous liquors were sold to other persons than boarders and lodgers, at times to persons who were drunk, at times to persons who came in drunk and drank there and went out drunk, and at other times to those who came out and went away from the house in a noisy manner and went sky-larking in the streets; that the house was kept open on Sunday and at late hours of the night; that persons coming out of the house were drunk and disorderly;⁵ that there was such a noise in the house as to make it a nuisance; that there was quarreling or fighting, or breaking into or out of the house by persons attempted to be kept out or in;⁶ that an instrument or device for gambling was used or kept in the house either by the keeper or any other person by his permission;⁷ that parties were permitted to play at games in the house for money;⁸ that parties were permitted to make a great noise in the house, rolling bowls in a game commonly called ten-pins;⁹ that persons were permitted to remain in the house, fighting of cocks, boxing, playing at cudgels, and misbehaving themselves generally,¹⁰ all of which several acts it has been held

¹ State v. Hand, 7 Iowa, 411.

² Williamson v. State, 16 Ala., 431.

³ State v. Worth, R. M. Charl., 5.

⁴ Couch v. State, 24 Texas, 557; Stevens v. People, 67 Ills., 587.

⁵ U. S. v. Columbus, 5 Cranch C. C., 304; Com. v. Stewart, 1 Serg. & R., 342.

⁶ Com. v. O'Brien, 8 Gray, 487; Garrison v. State, 14 Ind., 281; Bloomhuff v. State, 8 Blackf., 205.

⁷ People v. Butler, 1 City Hall Rec., 66.

⁸ Rex v. Rogier, 1 B. & C., 272; 2 D. & R., 431.

⁹ Bloomhuff v. State, 8 Blackf., 205.

¹⁰ Rex v. Higginson, 2 Bur., 1233.

may be proved for the purpose of showing that the house was disorderly. But the keeping of a billiard table in the house where persons assemble to play the game of billiards for amusement, even though they bet upon the game so far as to determine who shall pay for the use of the table, does not make the house disorderly.¹ The mere opinion of a witness that the house as kept is a nuisance, is not admissible in evidence;² and proof of riot or disorder in the neighborhood is not necessary.³

§ 219. **Lessor of a House of Ill-Fame, when Liable.** — At common law the letting of a house to a woman of ill-fame, knowing her to be such, with intent that it should be used for the purpose of prostitution, is aiding in the commission of the offense of keeping a house of ill-fame, making the lessor an accessory, for which he may be punished as principal.⁴ It has been held that if a person merely lets the house and collects the rents as agent of the owner, he is responsible.⁵

STATEMENT OF THE OFFENSE OF LEASING A HOUSE TO BE USED AS A
HOUSE OF ILL-FAME.

(Commence as in form on page 112) that C. D., on,⁶ etc., at, etc., did unlawfully lease and let a certain house and premises there situated (*described as follows, insert description*), to one E. F.,⁷ for the term of six months⁸ from the said last-named day, to be used by the said E. F. for the purpose of keeping and maintaining a house of ill-fame and place for the practice of pros-

¹ *Lansing v. Smith*, 8 Cowen, 146; *People v. Sergeant*, 8 Cowen, 139; *Tanner v. Trustees*, 5 Hill N. Y., 121; *Harbaugh v. People*, 40 Ills., 294.

² *Smith v. Com.*, 6 B. Monr., 21.

³ *U. S. v. Columbus*, 5 Cranch C. C., 304.

⁴ *Com. v. Harrington*, 3 Pick., 26; *Smith v. State*, 6 Gill, 425; *U. S. v. Gray*, 2 Cranch C. C. R., 748; *People v. Townsend*, 3 Hill, 479; *contra*, *Reg. v. Stannard*, Leigh & C., 349, 354; *Brockway v. People*, 2 Hill, 558.

⁵ *Lowenstein v. People*, 54 Barb., 299.

⁶ The complaint must state the time of making the lease. *Com. v. Moore*, 11 Cush., 600; but it is not necessary to prove the time as alleged. *Com. v. Harrington*, 3 Pick., 26.

⁷ The name of the lessee should be stated or a reason given for the omission. *Com. v. Moore*, 11 Cush., 600.

⁸ It is not necessary to state the time when the lease commenced or was at an end. *Smith v. State*, 6 Gill, 425; *State v. Abrams*, 6 Iowa, 117.

titution and lewdness, to the encouragement of idleness, fornication and other misbehavior, the said C. D. then and there well knowing that the said house and premises were to be used for the purpose aforesaid, to the common nuisance of all the people, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

10. DISTURBING MEETINGS, ETC.

§ 220. **Religious Meetings.**—“Whoever by menace, profane swearing, vulgar language or any disorderly or unusual conduct, interrupts or disturbs any assembly of people met for the worship of God shall be fined not exceeding one hundred dollars.”¹

STATEMENT OF THE OFFENSE OF DISTURBING A RELIGIOUS MEETING.

(*Commence as in form on page 112*) that C. D., on, etc., at a certain meeting-house of the (*insert the name of the denomination of the church*) church (*or at a certain camp-ground of the Methodist church*) in the town of — in the said county, did² willfully and unlawfully, by menace, profane swearing,³ vulgar language, disorderly and unusual conduct,⁴ interrupt and disturb an assembly⁵ of people then and there met for the worship of God,⁶ contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

§ 221. **Disturbing Camp and Field Meeting.**—“Whoever, during the time of holding any camp or field meeting for religious

¹ R. S., 360, § 56.

² The name of the society may be omitted. *State v. Ringer*, 6 Blackf., 109.

³ It is sufficient to state the offense substantially in the words of the statute. *Com. v. Daniels*, 2 Va. Cas., 402; *State v. Ratliff*, 5 Engl., 530; *State v. Hopper*, 27 Mo., 599; *State v. Bankhead*, 25 Mo., 558.

⁴ Using the words “by profane swearing” and “by talking and laughing aloud” has been held not to make the allegation bad for duplicity. 2 Bish. Cr. P., § 295; *State v. Horn*, 19 Ark., 578. The words of the profanity need not be given. *State v. Ratliff*, 5 Engl., 530.

⁵ The manner of the disturbance must be stated and must be proved as laid. *Stratton v. State*, 13 Ark., 688; *State v. Sherrell*, 1 Jones N. C., 508, 509.

⁶ The use of the word “congratation” makes an indictment defective. *State v. Stubblefield*, 32 Mo., 563.

⁷ Charging the defendant with disturbing a religious assembly commonly called a quarterly meeting conference, has been held insufficient in an indictment at common law. It should charge that the assembly met for the worship of God, R. S., 360, § 58; *State v. Fisher*, 3 Ired., 111; or for a lawful purpose, R. S., 360, § 60.

purposes, and within one mile of the place of holding such meeting, hawks or peddles goods, wares or merchandise, or without permission of the authorities having charge of such meeting, establishes any tent, booth or other place for vending provisions or refreshments, or sells, or gives away, or offers to sell or give away, any spirituous liquor, wine, cider or beer, or practices or engages in gaming or horse-racing, or exhibits, or offers to exhibit, any show or play, shall be fined not exceeding one hundred dollars for each offense: *Provided*, that whoever has his regular place of business within such limits is not hereby required to suspend his business.”¹

STATEMENT OF THE OFFENSE ESTABLISHING TENT FOR SELLING PROVISIONS
NEAR A CAMP-MEETING.

(*Commence as in form on page 112*) that C. D., during the time of holding a camp-meeting for religious purposes on the — day of —, A. D. 18—, within one mile from the place of holding such meeting, in the town of —, in said county, not having his place of business within such limits of one mile, without the permission of the authorities having charge of the said meeting, unlawfully did establish a tent for vending provisions and refreshments contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

§ 222. Disturbing any School, etc. — “Whoever willfully interrupts or disturbs any school or other assembly of people, met for a lawful purpose, shall be fined not exceeding one hundred dollars.”²

STATEMENT OF THE OFFENSE OF DISTURBING A SCHOOL.

(*Commence as in form on page 112*) that C. D., on, etc., at, etc., in said county, did willfully³ interrupt and disturb a school, then and there met for a lawful purpose,⁴ contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

¹ R. S., 360, § 59.

² *Id.*, § 60.

³ The allegation that the disturbance was “willfully” done, is necessary. *State v. Bankhead*, 25 Mo., 558; *State v. Hopper*, 27 Mo., 599.

⁴ The words “met for a lawful purpose,” are in the statute and necessary. *State v. Gager*, 28 Conn., 232.

§ 223. **Disturbing a Funeral.** — “Whoever willfully interrupts or disturbs a funeral assembly or procession, shall be fined not exceeding one hundred dollars.”¹

§ 224. **Evidence.** — It must be proved: 1. *That there was an assembly of people*; 2. *That such assembly had met to worship God² or for a lawful purpose*;³ 3. *That such assembly was disturbed by the defendant*,—or he should be acquitted. The place must be proved as laid.⁴ The point of time when the assembly should be considered as met together, has been held to be a mixed question of law and fact which in some cases should be submitted to the jury.⁵ Where the disturbance was made at night on the camp-ground of those assembled, after the services were over for the day and the worshipers had retired to rest, the court held that there was still a sufficient assembly of the people to make the disturber liable under the statute.⁶ The statute is violated by a disturbance at any time before the assembly has so dispersed as to be no longer an assembly.⁷

§ 225. **What is a Disturbance** depends upon the nature and character of each particular kind of meeting, and much also upon the usage and practice governing such meeting.⁸ What would be a disturbance of a religious meeting would not be a disturbance of a theater.⁹ Where in a contest for a situation of a clerk to a meeting-house, one clerk pulled the other from the desk, it was held to be a disturbance within the statute.¹⁰ The audience at a theater may hiss down the play

¹ R. S., 361, § 61

² Id., 360, § 58.

³ Id., 361, § 61.

⁴ Stratton v. State, 13 Ark., 688.

⁵ State v. Snyder, 14 Ind., 429; Marvin v. State, 19 Ind., 181; State v. Gager, 28 Conn., 232.

⁶ Com. v. Jennings, 3 Grat., 624; *contra*, State v. Edwards, 32 Mo., 548.

⁷ Williams v. State, 3 Sneed, 313; Kinney v. State, 38 Ala., 224; Hollingsworth v. State, 5 Sneed., 518, 520.

⁸ Com. v. Porter, 1 Gray, 476.

⁹ 2 Bish. Cr. L., §§ 308, 309; see state v. Yeaton, 53 Me., 125.

¹⁰ Rex v. Hube, 5 T. R., 542.

or the actor if they do not like the performance,¹ but they have no right to confederate and conspire together beforehand to cry down any actor or performance for the purpose of ruining the actor if he does not deserve such treatment.² The disturbance must be willful and designed, for an act done through accident or mistake is not criminal.³

11. GAMING.

§226. Provisions of the Statute Relating to Gaming. — “Whoever shall play for money or other valuable things, at any game with cards, dice, checks, or at billiards, or with any other article, or instrument or thing whatsoever, which may be used for the purpose of playing or betting upon, or winning or losing money, or any other thing or article of value, or shall bet on any game others may be playing, shall be fined not exceeding one hundred dollars and not less than ten dollars.”⁴

STATEMENT OF THE OFFENSE OF GAMING.⁵

(Commence as in form on page 112) that C. D., on, etc., at, etc., in the county aforesaid,⁶ did unlawfully play⁷ for money⁸ to wit.: the sum of one

¹ *Rex v. Forbes*, 1 Crawf. & Dix. C. C., 157.

² *Clifford v. Brandon*, 2 Camp., 358.

³ *Com. v. Porter.*, 1 Gray, 480.

⁴ R. S., § 126; see *Gallagher v. State*, 26 Wis., 423.

⁵ For form of complaint in the state of Wisconsin, see *Gallagher v. State*, 26 Wis., 423; *State v. Lewis*, 12 Wis., 434.

⁶ It is a sufficient statement of the place to allege that it was in the county without stating the town or building or other place in which the parties played. *Covy v. State*, 4 Port., 186; *Groner v. State*, 6 Florida, 39; see also *Sublett v. State*, 9 Texas, 53.

⁷ It is not necessary to state with whom the accused played or with whom he bet. *Green v. People*, 21 Ills., 125; *Orr v. State*, 18 Ark., 450; *Romp v. State*, 3 Iowa, 276; *Graham v. State*, 1 Pike, 171; *State v. Dole*, 3 Blackf., 230; *Domer v. State*, 2 Carter, 308; *State v. McBride*, 8 Humph., 66; *State v. Prescott*, 33 N. H., 212; *contra*, *Parrott v. State*, 5 Engl., 18 Ark., 195; *Davis v. State*, 22 Ga., 101; *Gronner v. State*, 6 Florida, 39.

⁸ A charge that the defendant played for “valuable things” has been held to be too vague; and that the things played for must be set forth and described. *Anthony v. State*, 4 Humph., 83; *contra*, *Romp v. State*, 3 Iowa, 276.

dollar¹ at a game² with cards³ contrary⁴ to the form of the statute in such case made and provided (*conclude as in form on page 112*).

STATEMENT OF THE OFFENSE OF BETTING ON A GAME.

(*Commence as in form on page 112*) that C. D., on, etc., at, etc., in the county aforesaid, did unlawfully bet a certain sum of money, *to wit.*, the sum of five dollars⁵ (or "*a certain valuable thing,*⁶ *to wit.*, *one horse of the value of one hundred dollars*") with E. F.,⁷ on a certain game with cards called whist,⁸ then and there⁹ being played by and between G. H. and I. J.,¹⁰

¹ It is not necessary to state the amount played for. *Dean v. Tennessee*, Mart. & Yerg., 127; *Warren v. State*, 18 Ark., 195; *Medlock v. State*, 18 Ark., 363; *Romp v. State*, 3 Iowa, 276; *Com. v. Tierman*, 4 Grat., 545; *Com. v. Crupper*, 3 Dana, 466; *State v. McBride*, 8 Humph., 66.

² It is not necessary to state the name of the game played. *Green v. People*, 21 Ills., 125; *State v. Dole*, 3 Blackf., 230; *Dromer v. State*, 2 Carter, 308; *State v. Maxwell*, 5 Blackf., 230; *State v. Ross*, 7 Blackf., 322; *Webster v. State*, 8 Blackf., 400; *Com. v. Bolkom*, 3 Pick., 281; *State v. Prescott*, 33 N. H., 212; *Com. v. Tierman*, 4 Grat., 545; *Johnson v. State*, 7 Sm. & M., 58.

³ An allegation using the words "with cards, dice and checks," is not bad for duplicity. 1 Bish. Cr. P., § 586; *Wingard v. State*, 13 Ga., 396.

⁴ Since at common law gaming is not a criminal offense, 1 Bish. Cr. L., § 504, the conclusion should be contrary to the form of the statute; *ante* page 37, note 1.

⁵ The particular sum bet need not be mentioned. *Moffit v. State*, 6 Engl., 169; *State v. Prescott*, 33 N. H., 212; *Com. v. Tierman*, 4 Grat., 545; *State v. Ake*, 9 Texas, 538; *State v. McBride*, 8 Humph., 66.

⁶ The thing bet should be particularly described. *Anthony v. State*, 4 Humph., 83; *State v. Kilgore*, 6 Humph., 44; *contra*, *Harrison v. State*, 15 Texas, 239.

⁷ It has been held unnecessary to state the name of the person with whom the bet was made. *Coggins v. State*, 7 Port., 263; *Romp v. State*, 3 Green, 2 Iowa, 276; *Drew v. State*, 5 Engl., 82; *Green v. People*, 21 Ills., 125; or that the accused bet with any particular individual; *Drew v. State*, 5 Engl., 82; *Moffit v. State*, 6 Engl., 169.

⁸ The name of the game may be omitted if it is stated that the game was with cards. *Webster v. State*, 8 Blackf., 400; *State v. Maxwell*, 5 Blackf., 230; *State v. Ross*, 7 Blackf., 322; *Gibbony v. State*, 14 Grat., 582; 2 Dev. & Bat., 29; *Groner v. State*, 6 Flor., 39.

⁹ It is not necessary to allege that the game was played in the county where the bet was made. *State v. Kyle*, 10 Mo., 389.

¹⁰ It is proper if not necessary to state the names of the persons who played, so as to identify the particular offense. *Ball v. State*, 7 Blackf., 242; *Butler v. State*, 5 Blackf., 280; *Davis v. State*, 7 Ham., 204; *Brown v. State*, 5 Engl., 574; *Jester v. State*, 14 Ark., 552; but see *Green v. People*, 21 Ills., 125; *Rice v. People*, 38 Ills., 435.

contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

§ 227. **What a Valuable Thing within the Meaning of the Statute.** — The offense of gaming may be committed by playing for checks, notes, or other instruments understood by the parties to represent value and by virtue of which the winner can in fact obtain value, whether they are collectible by law or not;¹ therefore the playing for or betting checks or counters, which are agreed by the parties to represent money or bank notes, to be paid by the losing party, is a violation of the statute.² An animal such as a horse or a cow, though not included within the meaning of the word "thing" as defined by the dictionaries, is probably a "valuable thing" within the intent and meaning of the statute, so as to make it an offense to play for or bet it.

§ 228. **Who Liable.** — All persons encouraging the playing of cards for money or other valuable thing, though they may not bet, are guilty of gaming³ at least as an accessory.⁴ It has been held in another state that where a person plays a game with cards, knowing that others are betting on the game, he is guilty of gaming.⁵ Playing for the price of liquor is a violation of the statute against gaming.⁶ But an agreement that the losing party shall pay for the use of the billiard table on which a game of billiards is played, is not playing for money within the meaning of the statute.⁷

§ 229. **A Variance** between the time the offense is alleged to have been committed and the time proved, is immaterial.⁸ Where it is alleged that a certain sum of money was play-

¹ *Gibbons v. People*, 33 Ills., 442.

² *Id.*; *Ashlock v. Com.*, 7 B. Monr., 44; *Walton v. State*, 14 Texas, 381.

³ *Howlet v. State*, 5 Yerg., 145; *Frigate v. State*, 2 Hump., 397.

⁴ *R. S.*, 393, § 274.

⁵ *Smith v. State*, 5 Hump., 163, *contra*, *Strawhen v. State*, 27 Mis., 432.

⁶ *People v. Lyner*, 5 City H. Rec., 136; *State v. Maurer*, 7 Iowa, 407; *State v. Cooster*, 10 Iowa, 455.

⁷ *Harbaugh v. People*, 40 Ills., 294; *People v. Sergeant*, 8 Cowen, 140; *contra*, *State v. Leighton*, 3 Foster, 167.

⁸ *Com. v. Hyde*, Thach. Cr. Cases, 19.

ed for, the prosecutor may prove that the parties played for a smaller sum.¹ But a person charged with playing for money cannot be convicted by proof that he played for property.² Where A and B were jointly charged with the offense of gaming, and were tried together, and it appeared by the evidence that A and others played at one time when B was not present, and that B and others played at one time when A was not present, it was held that there could be no conviction against them because they were not jointly liable for each offense.³

§ 230. **Recovery of Losses by Gaming.** — The statute provides that “any person who shall, at any time or sitting, by playing at cards, dice or any other game or games, or by betting on the side or hands of such as do game, or by any wager or bet upon any race, fight, pastime, sport, lot, chance, casualty, election, or unknown or contingent events whatever, lose to any person so playing or betting any sum of money or other valuable thing, amounting in whole to the sum of ten dollars, and shall pay or deliver the same or any other part thereof, the person so losing and paying or delivering the same shall be at liberty to sue for and recover the money, goods or other valuable thing so lost and paid or delivered, or any part thereof, or the full value of the same, by action of debt, replevin, assumpsit or trover, or proceeding in chancery, from the winner thereof, with costs in any court of competent jurisdiction. In any such action at law it shall be sufficient for the plaintiff to declare generally as in actions of debt or assumpsit for money had and received by the defendant to the plaintiff’s use, or as in actions of replevin or trover upon a supposed finding and the detaining or converting of the property of the plaintiff to the use of the defendant, whereby an action hath accrued to the plaintiff, according to the form of this act, without setting forth the special matter. In case the person who shall lose such money or other thing as afore-

¹ *Parsons v. State*, 2 Carter, 499.

² *Horton v. State*, 8 Engl., 62; *Williams v. State*, 12 Sm. & M., 58.

³ *Elliott v. State*, 26 Ala., 78.

said, shall not, within six months, really and *bona fide*, and without covin or collusion, sue and with effect prosecute for such money or thing by him lost and paid or delivered as aforesaid, it shall be lawful for any person to sue for and recover treble the value of the money, goods, chattels and other things with costs of suit by special action on the case, against such winner aforesaid, one-half to the use of the county and the other to the person suing.”¹

§ 231. **Premises Liable for Losses.** — “If any person shall rent or lease to another any building or premises to be used or occupied, in whole or in part, as a common gaming-house or place for persons to come together to play for money or other valuable thing, or bet upon any game of chance, or shall knowingly permit the same to be so used or occupied, such building or premises so used or occupied shall be held liable for, and may be sold to pay, any judgment that may be recovered under the preceding section. Proceedings may be had to subject the same to the payment of any such judgment recovered which remains unpaid, or any part thereof, either before or after execution shall issue against the property of the person against whom such judgment shall have been recovered; and when execution shall issue against the property so leased or rented, the officer shall proceed to satisfy said execution out of the building or premises so leased or occupied as aforesaid: *Provided*, that if such building or premises belong to a minor or other person under guardianship, the guardian or conservator of such person, and his real and personal property, shall be held liable instead of such ward, and his property shall be subject to all the provisions of this section relating to the collection of said judgment.”²

§ 232. **Enumerated Cases held to be within the Statute Relating to Betting.** — A bet or wager implies a risk in both parties;³ therefore, where goods are sold at their fair valuation, to be paid for when a particular candidate is elected, the transac-

¹ R. S., 372, § 132.

² Id. § 133.

³ *Hizer v. State*, 12 Ind., 330; *Quarles v. State*, 5 Humph., 561.

tion is not a bet or wager,¹ though it would be a bet or wager if the goods were sold at a price exceeding their fair value.² So an agreement between two persons, the one to make the other a present of a coat if the candidate selected by him is not elected, is in law a bet equally if it was such in words.³ The voting of electors of this state for a president of the United States is an election within the meaning of the statute.⁴ Formerly betting on the result of an election in another state was held not to be illegal,⁵ but under the present statute it is illegal to bet on an election to be held anywhere.⁶ Betting on a horse-race is betting on a game within the meaning of the statute, and the money so lost may be recovered back.⁷

12. BARRATRY.

§ 233. **Provisions of the Statute.** — “If any person shall wickedly and willfully excite and stir up any suits or quarrels between the people of this state, either at law or otherwise, with a view to promote strife and contention, he shall be deemed guilty of common barratry, and shall be fined not exceeding one hundred dollars; and if he be an attorney or counselor-at-law, he shall be suspended from the practice of his profession, for any time not exceeding six months.”⁸

STATEMENT OF THE OFFENSE OF BARRATRY.

(Commence as in form on page 112) that C. D., on the — day of —, A. D. 18—, and on divers other days and times, as well before as afterwards,⁹

¹ Quarles v. State, 5 Humph., 561.

² Givens v. Roger, 11 Ala., 543; Parsons v. State, 2 Ind., 499.

³ Johnson v. Jones, 3 Sm. & M., 456.

⁴ McClurken v. Detrick, 33 Ills., 349.

⁵ Morgan v. Pettit, 3 Scam., 529.

⁶ R. S., 372, § 132; David v. Ransom, 1 Greene Iowa, 383.

⁷ Tatman v. Strader, 23 Ills., 493; Mosher v. Griffin, 51 Ills., 184; Garrison v. McGregor, 51 Ills., 473; *contra*, Adams v. U. S., Morris Iowa, 169.

⁸ R. S., 355, § 26.

⁹ Probably the words “and on divers other days and times, as well before as afterwards,” are unnecessary, though it is usual and safer to insert them, for without these words the court might possibly erroneously confine the proof within the limits of a single day. 2 Bish. Cr. P., 103.

at, etc., in the county aforesaid, was a common barrator,¹ and did on the said first-mentioned day, and on said other days and times, and there wickedly and willfully excite and stir up divers suits and quarrels between the people of this state, at law and otherwise, with a view then, and on said other days and times, and there to promote strife and contention, to the common nuisance of all the people² (*conclude as in form on page 112*).

§ 234. **Bill of Particulars.**—According to the common-law practice, where the particular facts were not stated in charging the offense of barratry, the prosecutor was required to give the defendant before the trial a note of the particular acts of barratry, which he intended to prove against him,³ and if he did not, the court would not suffer the prosecution to proceed with the trial for the offense.⁴ For otherwise it would have been impossible for him to have prepared for the defense.⁵ The prosecutor was not at liberty to give evidence of any other acts of barratry than those which were stated in the note of the particulars.⁶ But we do not know of any decision of the courts of this state adopting such practice here except so far as it is adopted as a part of the common law.⁷

§ 235. **Who Guilty of Barratry.**—A justice of the peace, by exciting and stirring up suits for the purpose of getting fees, makes himself guilty of barratry, though the suits are not groundless.⁸ An attorney who merely maintains a groundless action cannot be guilty of barratry if he did not advise

¹ Alleging that the defendant was a common barrator, was necessary at common law, 2 Bish. Cr. L., § 65; *Rex v. Hardwick*, 1 Sid., 282; *Reg. v. Harmon*, 6 Mod., 311; *Reg. v. Urlyn*, 2 Saund., 308; and was a sufficient statement of the offense without showing any particular facts. 2 Arch. C. P. & Pl., 1071; *Lambert v. People*, 9 Cowen, 578; *Com. v. Davis*, 11 Pick., 432; 13 Pick., 362.

² The conclusion to the common nuisance may possibly be essential. 2 Bish. Cr. P., § 101.

³ *Rex v. Hodgson*, 3 Car. & P., 422; *Rex v. Bootyman*, 5 Car. & P., 590; *Lambert v. People*, 9 Cowen, 587; *Com. v. Snelling*, 15 Pick., 321.

⁴ 2 Bish. Cr. P., § 100.

⁵ *Rex v. Grove*, 5 Mod., 18; *Anson v. Stewart*, 1 T. R., 754.

⁶ *Goddard v. Smith*, 6 Mod., 262; *Lambert v. People*, 9 Cowen, 587; *Com. v. Pray*, 13 Pick., 362; *Com. v. Davis*, 11 Pick., 432.

⁷ *U. S. v. Ross*, *Morris Iowa*, 164.

⁸ *State v. Chitty*, 1 Bailey, 379.

or encourage its commencement.¹ The offense of barratry may be committed by taking and keeping possession of lands in controversy, by all kinds of disturbance of the peace, or by spreading false rumors and calumnies whereby discord may grow among neighbors.² It has been held that a man does not make himself guilty of barratry by commencing any number of false actions in his own right,³ but the better opinion seems to be that if such actions are merely groundless and vexatious, without any manner of color, the party commencing them is guilty of barratry.⁴ The commencement of three suits, with intent to harass and oppress the debtor, when only one was necessary, may be evidence of three acts of barratry.⁵

§ 236. Number of "Suits or Quarrels" Necessary. — The words of the statute,⁶ "suits or quarrels," seem to imply that there should be more suits or quarrels than one excited or stirred up. Just how many instances of offending must be proved, does not seem to be clearly settled by the authorities.⁷ At common law three instances were ordinarily sufficient to make the defendant guilty of barratry.⁸

§ 237. Jurisdiction — Attorney. — Where the accused is an attorney or counselor-at-law, since the punishment in addition to the fine is that he shall be suspended from practice of his profession for any time not exceeding six months, a justice of the peace has no jurisdiction of the offense.⁹ Possibly to convict the defendant as an attorney or counselor, or to oust the justice of jurisdiction, it would be necessary to both allege and prove that he was an attorney or counselor.

¹ 1 Hawk P. C. C., 81, § 11.

² Rex v. Urlyn, 2 Saund. R., n. 1; Hawk P. C. C., 81, §§ 1, 2; 8 Co., 36.

³ 2 Arch. C. P. & Pl., 1070, Roll. Abr., 355.

⁴ 2 Bish. Cr. L., § 66; 1 Hawk P. C. C., 475, § 3; Anonymous, 3 Mod., 97.

⁵ Com. v. McCulloch, 15 Mass., 227; State v. Chitty, 1 Bailey, 379.

⁶ R. S., 355, § 26.

⁷ Com. v. McCulloch, 15 Mass., 227; Com. v. Davis, 11 Pick., 432; Com. v. Tubbs, 1 Cush., 2, 3; State v. Chitty, 1 Bailey, 379.

⁸ 2 Bish. Cr. L., § 65; Roscoe Cr. Ev., 308.

⁹ R. S., 405, § 381.

13. MAINTENANCE.

§ 238. **Provisions of the Statute.** — “If any person shall officiously intermeddle in any suit at common law or in chancery, that in nowise belongs to or concerns such person, by maintaining or assisting either party, with money or otherwise, to prosecute or defend such suit, with a view to promote litigation, he shall be deemed guilty of maintenance, and upon conviction thereof, shall be fined and punished as in cases of common barratry: *Provided*, that it shall not be considered maintenance for a man to maintain the suit of his kinsman or servant, or any poor person out of charity.”¹

STATEMENT OF THE OFFENSE OF MAINTENANCE.

(Commence as in form on page 112) that on, etc., at, etc., in the said county, C. D. did unlawfully and officially intermeddle in a certain suit then and there depending and undetermined in the circuit court of the said county of —, wherein one E. F. was plaintiff and one G. H. was defendant, in a plea of debt that then and there in nowise belonged to or concerned the said C. D., by then and there maintaining and assisting the said E. F., a party-plaintiff in the said suit, with money and otherwise, to then and there prosecute the said suit, with a view then and there to promote litigation,² contrary to the form of the statute in such case made and provided³ (conclude as in form on page 112).

§ 239. **Evidence of Officiously Intermeddling, etc.** — 1. It must be shown that the defendant *officiously intermeddled with a suit by maintaining or assisting, with money or otherwise, to prosecute or defend it.*⁴ This may be done by retaining one to be counsel for a party to the suit, or otherwise paying the whole or a part of the expenses of the suit,⁵ or by furnishing

¹ R. S., 355, § 27; *Underwood v. Riley*, 19 Wis., 412; *Baker v. Baker*, 14 Wis., 131.

² It is not necessary to negative the proviso in the statute. 1 Bish. Cr. P., § 639; *Lequat v. People*, 11 Ills., 330; *Metzgar v. People*, 14 Ills., 101; *contra*, *Mills v. Kennedy*, 1 Bailey, 17.

³ Probably it is not necessary that the conclusion should be against the form of the statute. 2 Bish. Cr. P., § 115.

⁴ R. S., 355, § 27; *Andrew v. Thayer*, 30 Wis., 228.

⁵ 2 Arch. C. P. & Pl., 1072; 1 Hawk P. C. C., 83, § 4; *Barker v. Barker*, 14 Wis., 131; *Underwood v. Riley*, 19 Wis., 412; *Miller v. Larson*, Id., 463.

any other valuable thing for the purpose of maintaining the action, and by taking and holding possession of lands in controversy for a party to the suit by force or subtility.¹ Hawkins said "that a man of great power, not learned in the law, may be guilty of maintenance by telling another who asks his advice that he has a good title," but we cannot think that such is the law under our statute.² It seems clear that a man is in no danger of being guilty of an act of maintenance by giving another friendly advice as to his proper remedy at law or as to the counselor or attorney.³ A mere promise to maintain a suit is not in itself maintenance.⁴ An attorney-at-law may contract to render services in the conduct of a suit for a fee contingent upon his success therein, and such fee may be a stipulated percentage of the amount, or a portion of the property recovered. Such contract does not make the attorney guilty of maintenance. Otherwise in case he undertakes to pay any part of the expenses of the litigation.⁵

§ 240. *Evidence of Want of Interest.* — 2. It must be shown, unless the circumstances are such that it will be presumed that the suit *in nowise belonged to or concerned the defendant*.⁶ Probably under ordinary circumstances, this being a negative fact, particularly within the knowledge of the defendant, will be presumed unless the contrary is shown.⁷ If a person has an interest in a thing, whether great or small, certain or uncertain, vested or contingent, he may assist in maintaining an action for it.⁸ For example, it is not maintenance for a vendor with a warranty to uphold his vendee in

¹ 2 Bish. Cr. L., § 123; *Baley v. Deakins*, 5 B. Monr., 159.

² 2 Bish. Cr. L., § 126.

³ 2 Hawk P. C. C., 83, § 9.

⁴ *Id.*, § 8; 2 Arch C. P. & Pl., 1072.

⁵ *Allard v. Lamirande*, 29 Wis., 502; *Stearns v. Felker*, 28 Wis., 595.

⁶ R. S., 355, § 27.

⁷ *Great Western R. R. Co. v. Bacon*, 30 Ills., 347; *Potter v. Deyo*, 19 Wen., 361.

⁸ *Master v. Miller*, 4 T. R., 320; *Thalihimer v. Brinckerhoff*, 3 Cowen, 639; *Lathrop v. Amherst Bank*, 9 Met., 489; *Knight v. Sawin*, 6 Greenl., 361; *Cummins v. Latham*, 4 B. Monr., 105; *Wickham v. Conklin*, 8 John., 220.

a suit about the title.¹ An heir-apparent is permitted to do the same for an ancestor concerning the inheritance of land of which he is seized in fee.² So where several are interested in the general question to be decided, they may contribute to the expense of obtaining a judicial determination of that question.³

§ 241. 3. Evidence of Intermeddling to Promote Litigation. — 3. It must be proved that the intermeddling, by maintaining or assisting in the prosecution or defense of the suit, was *with a view to promote litigation*.⁴ Many acts deemed maintenance at common law are not offenses under our statute, for the reason that they are not done with a view to promote litigation. An attorney may maintain a suit for a party under an agreement to divide the money or property recovered without being deemed guilty of maintenance.⁵ The statute permits "a man to maintain the suit of his kinsman, servant or any poor person out of charity."⁶ And under a variety of circumstances landlords and tenants may assist one another in their suits,⁷ but a servant cannot lawfully lay out his own money to assist the master in his suit if done with a view to promote litigation.⁸ The general rule is that whenever there is a moral duty to assist another in a cause, or the act is done without the intent of promoting litigation, the assistance rendered is no violation of law.⁹

§ 242. Champerty. — The common-law offenses of champerty and barratry, except so far as they are included in the statu-

¹ Williamson v. Sammons, 34 Ala., 691; Goodspeed v. Fuller, 46 Me., 141.

² 1 Hawk P. C. C., 457, § 18; Persse v. Persse, 7 Cl. & F., 279; Thalihimer v. Brinckerhoff, 3 Cowen, 639.

³ Gowen v. Nowell, 1 Greenl., 293; Frost v. Paine, 12 Me., 111.

⁴ R. S., 355, § 27.

⁵ Newkirk v. Cone, 18 Ills., 449.

⁶ R. S., 355, § 27.

⁷ 1 Hawk P. C. C., 459, § 27; Thalihimer v. Brinckerhoff, 3 Cowen, 623.

⁸ 1 Hawk P. C. C., 83, §§ 36, 37.

⁹ 2 Bish. Cr. L., § 128.

tory offenses of barratry and maintenance, are abolished in this state.¹

14. COMPOUNDING A CRIME.

§ 243. Provisions of the Statute. — “Whoever takes money, goods, chattels, lands or other reward, or promise thereof, to compound any criminal offense, shall be fined in double the sum or value of the thing agreed for or taken; but no person shall be debarred from taking his goods or property from the thief or felon, or receiving compensation for the private injury occasioned by the commission of any such criminal offense.”²

§ 244. Jurisdiction. — A justice of the peace has jurisdiction to try the offense only where the sum or value of the thing agreed for or taken does not exceed one hundred dollars.³

STATEMENT OF THE OFFENSE OF COMPOUNDING A CRIME.

(Commence by stating the offense compounded as in ordinary cases and then add) that C. D. afterwards, *to wit.*, on the⁴ — day of —, A. D 18—, at, etc., in the said county, well knowing the said criminal offense had been committed, did unlawfully take and receive of the said E. F. a large sum of money, *to wit.*, the sum of fifty dollars, to then and there compound the said criminal offense, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

§ 245. Rule at Common Law and under the Statute as to Compounding Crimes. — At common law it was not uncommon when a person was convicted of a misdemeanor which principally and more immediately affected some individual, as battery, imprisonment, or the like, for the court to permit

¹ Newkirk v. Cone, 18 Ills., 449. In Ohio, Key v. Vattier, 1 Ohio, 132, Iowa, Wright v. Meek, 3 Greene, 472, and Vermont, Danforth v. Streeter, 28 Vt., 490, champerty is not a criminal offense.

² Id., § 43.

³ R. S., 358, § 43; Id., 405, § 381.

⁴ Where the time of committing the offense is alleged to be on a day subsequent in date to that on which it was charged to have been compounded, although charged to have been compounded afterwards, the affidavit is insufficient. State v. Dandy, 1 Brev., 395.

the defendant to speak with the prosecutor before any judgment was pronounced, and if the prosecutor declared himself satisfied, to inflict but a trivial punishment;¹ but in this state, under our statute,² there can be no settlement or compounding of either a felony³ or a misdemeanor.⁴ Even in an action on a penal statute, the plaintiff has no right to compound with the defendant without leave of the court, but he has a right to receive payment of the penalty or judgment, and may discharge it without leave of the court.⁵

§ 246. **What a Compounding of a Crime.** — Where a person who is charged with larceny pays money to the person from whom the property was stolen, upon an agreement that the latter would not prosecute for the larceny, that would be compounding a felony, and would of itself constitute a crime, and be punishable as such. If, however, the money was paid to the owner of the property stolen, for the purpose of reimbursing the latter for the expense he had incurred in searching for the property, the taking or receiving the money would not be criminal.⁶ Where a man accused his cashier of stealing money, and the cashier gave his note indorsed by his father to settle the matter, there being no prosecution set on foot or agreement not to prosecute it, it was held that there was no compounding a crime.⁷ Accepting the promissory note of one guilty of larceny, as a consideration for not prosecuting the offense, amounts to a compounding of a felony.⁸

¹ 4 Blackf., 363; *Beeley v. Wingfield*, 11 East, 46; *Baker v. Townsend*, 7 Taunt., 422; *Kirk v. Strickwood*, 4 B. & Ad., 421.

² R. S., 358, § 43.

³ *Jones v. Rice*, 18 Pick., 440; *Com. v. Pease*, 16 Mass., 91; *Plumer v. Smith*, 5 N. H., 553; *Rex v. Stone*, 4 Car. & P., 379; *Bothwell v. Brown*, 51 Ills., 234; *Taylor v. Cottrell*, 16 Ills., 94.

⁴ *Collins v. Blantern*, 2 Wilson, 341; *Edgecombe v. Rodd*, 5 East, 294; *Jones v. Rice*, 18 Pick., 440; *Beeley v. Wingfield*, 11 East, 46, n. 1.

⁵ *Bradway qui tam v. Leworthy*, 9 John., 251; *Plummer v. Smith*, 5 N. H., 553; *Bailey v. Buck*, 11 Vt., 252; *Burr.*, 1929; *Crowel qui tam v. Woodworth*, 11 John., 474; *Hinesburg v. Sumner*, 9 Vt., 26.

⁶ *Bothwell v. Brown*, 51 Ills., 234; *Taylor v. Cottrell*, 16 Ills., 94.

⁷ *Catlin v. Henton*, 9 Wis., 476.

⁸ *Com. v. Pease*, 16 Mass., 94; *Com. v. Corey*, 2 Mass., 524; 1 Camp., 45; 2 M. & S., 201.

§ 247. Evidence. — The record of the conviction is *prima facie* evidence of the felony, but not conclusive as against the compounder;¹ but in the case of a prosecution for compounding a crime and agreeing to withhold evidence, the acquittal of the principal offender is not competent evidence for the defense.²

15. ASSUMING A CORPORATE NAME.

§ 248. Provisions of the Statute. — “If any company, association or person puts forth any sign or advertisement, and therein assumes, for the purpose of soliciting business, a corporate name, not being incorporated, or, being incorporated, puts forth any sign or advertisement assuming any other or different name than that by which it is incorporated or authorized by law to act, such company, association or person shall be fined not less than ten dollars nor more than two hundred dollars, and a like sum for each day he or it shall continue to offend after having been once fined.”³

STATEMENT OF THE OFFENSE OF ASSUMING A CORPORATE NAME.

(Commence as in form on page 112) that C. D. and E. F., on, etc., at, etc., in the said county, then and there being a company, did put forth a certain sign and did then and there therein assume, for the purpose of soliciting business, a corporate name, the said C. D. and E. F. not being then and there incorporated, contrary to the form of the statute in such case made and provided (conclude as in form on page 112).

16. REFUSING TO ALLOW PRISONER TO SEE COUNSEL.

§ 249. Provisions of the Statute. — “All public officers, sheriffs, coroners, jailors, constables or other officers or persons having the custody of any person committed, imprisoned or restrained of his liberty for any alleged cause whatever, shall, except in cases of imminent danger of an escape, admit any practicing attorney-at-law of this state, whom such person so

¹ State v. Duhammel, 2 Harring., 532.

² People v. Buckland, 13 Wen., 592.

³ R. S., 385, § 220.

restrained of his liberty may desire to see or consult, to see and consult such person so imprisoned, alone and in private, at the jail or other place of custody; and when any such prisoner is about to be removed beyond the limits of this state by any person or public officer, under any pretence whatever, he shall at all times be entitled to reasonable delay for the purpose of obtaining counsel, and of availing himself of the laws of this state for the security of personal liberty. If any public officer, or other person aforesaid, shall violate the provisions of this act (section), he shall, for every such offense, forfeit and pay to the person aggrieved, one hundred dollars, to be recovered by action of debt,¹ in any court of competent jurisdiction.²

17. OMITTING TO LABEL OR KEEP RECORD OF POISONOUS DRUGS SOLD OR GIVEN AWAY.

§ 250. **Selling Poisonous Drugs without being Labeled.** — “Every druggist or other person who shall sell and deliver any arsenic, strychnine, corrosive sublimate, prussic acid or any other substance or liquid usually denominated as poisonous, without having the word “poison” written or printed upon a label attached to the phial or parcel in which such drug is contained, or shall sell and deliver any drug or medicine other than upon the prescription of a physician, without having the name of such drug or medicine printed or written upon a label attached to the phial or parcel containing the same, shall be fined not exceeding twenty-five dollars.”³

STATEMENT OF THE OFFENSE OF SELLING ARSENIC WITHOUT BEING PROPERLY LABELED.

(Commence as in form on page 112) that C. D., on, etc., at, etc., in the said county, did sell, and then and there deliver, arsenic, then and there being a poisonous substance, to one E. F., without then and there having the

¹ A justice of the peace has jurisdiction of the action of debt. R. S., 639, § 13. Therefore he has jurisdiction of an action for violating the provisions of this section of the statute.

² R. S., 387, § 229.

³ Id., 361, § 62.

word "poison" written or printed upon a label attached to the phial (or "parcel") in which the said arsenic was then and there contained, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

§ 251. **Selling, etc., Poisonous Drugs without Keeping a Record.** — "If any druggist or other person sells or gives away any arsenic, strychnine, corrosive sublimate or prussic acid, without the written prescription of a physician, and fails to keep a record of the date of such sale or gift, the article and amount thereof sold or given away, and the person to whom delivered, he shall be fined not exceeding fifty dollars for each neglect. Whoever purchases any such poison and gives a false or fictitious name, shall be punished in the same manner."¹

STATEMENT OF THE OFFENSE OF FAILING TO KEEP RECORD OF THE
SALE OR GIFT OF STRYCHNINE.

(*Commence as in form on page 112*) that C. D., on, etc., at, etc., in said county, did sell strychnine without the written prescription of a physician, and did not then and there keep a record of such sale, nor of the amount of said strychnine so sold, nor of the person to whom the said strychnine was then and there delivered, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

18. DRUNKENNESS.

§ 252. **Provisions of the Statute.** — "Any intoxicated person found in any street, highway, or other public place, or so found disturbing the peace of the public, or of his own or any other family in any private building or place, shall for the first offense be fined not more than five dollars, and upon any subsequent conviction shall be fined not exceeding twenty-five dollars. Prosecutions under this section shall be commenced within thirty days after the offense is committed, and the justice of the peace may remit the punishment, in whole or in part, when he is satisfied the public welfare and the good of the offender require it."²

¹ R. S., 361, § 63.

² Id., § 64.

STATEMENT OF THE OFFENSE OF DRUNKENNESS.

(Commence as in form on page 112) that C. D., on, etc., at, etc., was found in a public street then and there intoxicated, contrary to the form of the statute in such case made and provided (conclude as in form on page 112).

§ 253. Continued — Of Officer. — The statute provides that “any officer of a town, village, city, county or state, who shall be intoxicated while in the discharge of the duties of his office, shall be fined for the first offense the sum of ten dollars, and for the second offense the sum of twenty dollars, and for the third offense shall be guilty of a misdemeanor, and, on conviction of such misdemeanor, shall forfeit his office; and in such case the vacancy occasioned thereby shall be filled in the same manner as if such officer had filed his resignation in the proper office, and it had been accepted by the proper officer: *Provided*, such acceptance shall have been necessary to make the office vacant. The penalties for the first and second offense given by this section may be recovered in an action of debt, in the name of the people of the State of Illinois, before any justice of the peace of the proper county, and when collected shall be paid to the county superintendent where such offense shall have been committed, for the use of the school fund.”¹

19. OFFICER NOT TRYING TO PREVENT A DUEL.

§ 254. Provisions of the Statute. — “If any judge, justice of the peace, sheriff, or other officer bound to preserve the public peace, shall have knowledge of an intention on the part of any two persons to fight with a deadly weapon or weapons, and such officer shall not use and exert his official authority to arrest the parties and prevent the duel, every such officer shall be fined not exceeding one hundred dollars.”²

¹ R. S., 383, § 209.

² Id., 362, § 72.

STATEMENT OF THE OFFENSE OF AN OFFICER NOT TRYING TO PREVENT
A DUEL.

(Commence as in form on page 112) that C. D., on, etc., at, etc., in the said county, then and there being a sheriff of the said county, and being then and there bound to preserve the public peace, and then and there having knowledge of the intention on the part of E. F. and G. H. to fight with deadly weapons, did not use and exert his official authority to arrest the said E. F. and G. H. and then and there to prevent the duel, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

20. OFFICER NEGLECTING TO SUPPRESS AN UNLAWFUL AS-
SEMBLY OF TWELVE OR MORE PERSONS.

§ 355. Provisions of the Statute. — The statute provides in substance that “when twelve or more persons, any of them armed with clubs or dangerous weapons, or thirty or more, armed or unarmed, are unlawfully, riotously or tumultuously assembled in any city, village or town, it shall be the duty of each of the municipal officers, constables and justices of the peace thereof, and of the sheriff of the county and his deputies, to go among the persons so assembled, or as near to them as they can safely go, and in the name of the state command them immediately and peaceably to disperse; and if they do not obey, such officers shall command the assistance of all persons present, in arresting and securing the persons so unlawfully assembled;” “and each such officer having notice of such unlawful assembly, refusing or neglecting to do his duty in relation thereto as aforesaid, shall be fined not exceeding two hundred dollars.”¹

STATEMENT OF THE OFFENSE OF NEGLECTING TO SUPPRESS AN UN-
LAWFUL ASSEMBLY.

(Commence as in form on page 112) that on, etc., at, etc., in the said county, twelve or more persons, some of them armed with clubs and dangerous weapons, were unlawfully, riotously, and tumultuously assembled in the said town (*or village or city*); that C. D., then and there being a sheriff of the county aforesaid, and then and there having notice of the said unlawful assembly, did then and there refuse and neglect to go among the persons so

¹ R. S., 390, § 253.

assembled, or as near to them as he could safely go, and then and there in the name of the state command them immediately and peaceably to disperse, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

21. ILLEGAL FEES.

§ 256. **Provisions of the Statute.** — “ If any officer authorized by law to charge fees shall charge, claim, demand or take any greater fee than such as is by law allowed to him for the service performed, or shall charge, claim, demand or take any fee, or who shall knowingly charge a fee when no fee is allowed him by law, or when the services for which such fee is charged have not been performed by him or by some person for him, he shall, on the first conviction thereof, be fined not less than twenty-five dollars nor more than two hundred dollars, and upon a subsequent conviction of any like offense he shall forfeit his office, and be confined in the county jail not less than thirty days nor more than one year.”¹

STATEMENT OF THE OFFENSE OF TAKING ILLEGAL FEES.

(*Commence as in form on page 112*) that C. D., on, etc., at, etc., in the said county, then and there being a justice of the peace of said county, and then and there authorized by law to charge fees, did unlawfully charge, claim, demand, and take a greater fee than such as was by law then and there allowed to him, *to wit.*, for administering an oath to a witness on a trial then and there had before him between the said A. B. and one E. F., the sum of twenty-five cents, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

§ 257. **Continued — Private Remedy.** — “ Any officer who violates the provisions of the preceding section shall, in addition to the penalty therein provided, be fined for each item so charged, collected or received not less than ten dollars, nor more than one hundred dollars, to be sued for and recovered before any justice of the peace of the proper county, in an action of debt, in the name of the People of the State of Illi-

¹ R. S., 384, § 213.

nois, and for the use of the person against whom such fee is charged, or from whom the same is received or collected.”¹

22. INTIMIDATION OF WORKMEN, ETC.

§ 258. **Provisions of the Statute.** — “If any person shall, by threat, intimidation or unlawful interference, seek to prevent any other person from working or from obtaining work at any lawful business, on any terms that he may see fit, such person so offending shall be fined not exceeding two hundred dollars.”²

STATEMENT OF THE OFFENSE OF INTIMIDATING WORKMEN.

(*Commence as in form on page 112*) that C. D., on, etc., at, etc., in the said county, did then and there, by threat, intimidation and unlawful interference, seek then and there to prevent E. F. from working at a lawful business on the terms that C. D. then and there saw fit, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

23. ADVERTISING LOTTERIES.

§ 259. **Provisions of the Statute.** — “Whoever knowingly prints, publishes, distributes or circulates, or knowingly causes to be printed, published, distributed or circulated, any advertisement of any lottery ticket or scheme, or any share in such ticket or scheme, for sale, either himself or by another person, or sets up, or exhibits, or devises, or makes, for the purpose of being set up and exhibited, any sign, symbol, or emblematic or other representation of a lottery, or the drawing thereof, in any way indicating where a lottery ticket or any share thereof, or any such writing, certificate, bill, token, or other device before mentioned may be purchased or obtained, or in any way invites, or entices, or attempts to invite or entice, any other person to purchase or receive the same,

¹ R. S., 384, § 214. A proceeding under the preceding section for the same violation will not be a bar to an action under this. *People v. Stephens*, 13 Wen., 341; *Batchley v. Moser*, 15 Wen., 215.

² R. S., 376, § 159.

shall, for each offense be fined not exceeding one hundred dollars."¹

STATEMENT OF THE OFFENSE OF ADVERTISING A LOTTERY.

(Commence as in form on page 112) that C. D., on, etc., at, etc., in the said county, did unlawfully and knowingly print, publish, distribute and circulate an advertisement of a lottery ticket and scheme for sale, contrary to the form of the statute in such case made and provided (conclude as in form on page 112).

§ 260. Evidence. — It is not necessary to allege nor to prove upon the trial what kind of tickets the defendant advertised, nor that they were advertised as being for sale within the county where the indictment was found.² A sign-board at a person's place of business, giving notice that lottery-tickets are for sale there, is an advertisement within the meaning of the statute.³ And the continuance of such a sign-board, though put up before the statute went into effect, is a new advertisement by which the penalty of the statute is incurred.⁴

24. VAGABONDS.

§ 261. Provisions of the Statute. — "Vagabonds, idle and dissolute persons who go about begging, persons who use any juggling or unlawful games or plays, runaways, pilferers, common drunkards, common night-walkers, lewd, wanton and lascivious persons in speech or behavior, common railers and brawlers, persons who habitually neglect their employment or calling, and do not provide for themselves or for the support of their families, and all other idle and disorderly persons, including therein those persons who neglect all lawful business, and habitually misspend their time by frequenting houses of ill-fame, gaming houses or tippling shops, may be confined in the county jail, or in the work-house, if any there be in the county, or in the house of correction, if any there be in the

¹ R. S., 379, § 183.

² Com. v. Hooper, 5 Pick., 42; Com. v. Johnson, Thatcher, C. C., 284.

³ Com. v. Hooper, 5 Pick., 42.

⁴ Id. v. Johnson, Thatcher, C. C., 146.

county, to which the county has a right to commit any person, not exceeding six months.”¹

STATEMENT OF THE OFFENSE OF BEING A VAGABOND.

(Commence as in form on page 112) that C. D., on the — day of —, A. D. 18—, and from thenceforth to the present time, at, etc., in the said county, being then at the time first above mentioned, and all the time since to the present time, and there a vagabond, did go about begging, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

§ 262. Continued — Conviction before a Justice. — “When a person is convicted before a justice of the peace or police magistrate of any offense mentioned in the preceding section, he may, instead of the punishment therein mentioned, be fined not exceeding twenty dollars, with or without a condition that if the same, with the costs of the proceeding, is not paid within the timespecified, he shall be committed to the county jail or to the workhouse, if any there be within the county, or to the house of correction, if any there be in the county, to which the county has a right to commit any person, as is provided in the preceding section, which conditional sentence shall be carried into execution as in other cases of commitment.”²

25. SELLING LIQUOR WITHOUT LICENSE.

§ 263. Dram Shop Defined. — “A dram-shop is a place where spirituous or vinous or malt liquors are retailed by less quantity than one gallon, and intoxicating liquors shall be deemed to include all such liquors within the meaning of this act.”³

§ 264. Definition and Punishment. — “Whoever, not having a license to keep a dram-shop, shall by himself or another,

¹ R. S., 392, § 270. The justice has jurisdiction under this section. R. S., 405, § 381.

² R. S., 393, § 271.

³ Id., 438, § 1. The sale of cider at a public bar is not an offense under the statute, without proof that the cider was intoxicating. *Com. v. Chapel*, 116 Mass., 7.

either as principal, clerk or servant, directly or indirectly, sell any intoxicating liquor in any less quantity than one gallon, or in any quantity to be drank upon the premises, or in or upon any adjacent room, building, yard, premises or place of public resort, shall be fined not less than \$20 nor more than \$100, and imprisoned in the county jail not less than ten nor more than thirty days.”¹

§ 265. **How License may be Granted.** — “The county boards of each county may grant licenses to keep so many dram-shops in their county as they may think the public good requires, upon the application by petition of a majority of the legal voters of the town, if the county is under township organization, and if not under township organization, then of a majority of the legal voters of the election precinct or district, where the same is proposed to be located, and upon the payment into the county treasury of such sum as the board may require, not less than \$50 nor more than \$300 for each license, and upon the compliance with the provisions of this act: *Provided*, such board shall not have power to issue any license to keep any dram-shop in any incorporated city, town or village, or within two miles of the same, in which the corporate authorities have authority to license, regulate, restrain or prohibit the sale of liquors, or in any place where the sale of intoxicating liquors is prohibited by law.”²

§ 266. **Form of License — Rights under — May be Revoked.** — “The license shall state the time for which it is granted, which shall not exceed one year, the place where the dram-shop is to be kept, and shall not be transferable,³ nor shall the person licensed keep a dram-shop at more than one place at the same time, and any license granted may be revoked by the county board whenever they shall be satisfied that the person licensed has violated any of the provisions of this act, or keeps a disorderly or ill-governed house or place of resort for

¹ R. S., 438, § 2. As to construction of former statute, see *Anderson v. People*, 63 Ills., 53.

² R. S., 438, § 3.

³ *Lewis v. U. S.*, Morris Iowa, 199.

idle or dissolute persons, or allows any illegal gaming in his dram-shop, or in any house or place adjacent thereto.”¹

§ 267. **Bond — How Taken, Suit on.**—“No person shall be licensed to keep a dram-shop, or to sell intoxicating liquors, by any county board, or the authorities of any city, town, or village, unless he shall first give a bond in the penal sum of \$3000, payable to the people of the state of Illinois, with at least two good and sufficient sureties, freeholders of the county in which the license is to be granted, to be approved by the officer who may be authorized to issue the license, conditioned that he will pay to all persons all damages that they may sustain, either in person or property or means of support, by reason of the person so obtaining a license, selling or giving away intoxicating liquors. The officer taking such bond may examine any person offered as security upon any such bond, under oath, and require him to subscribe and swear to his statement in regard to his pecuniary ability to become such security. Any bond taken pursuant to this section may be sued upon for the use of any person or his legal representatives, who may be injured by reason of the selling or giving away any intoxicating liquor by the person so licensed, or by his agent or servant.”²

§ 268. **Selling or Giving to a Minor or Drunkard.**—“Whoever by himself or his agent or servant, shall sell or give intoxicating liquor to any minor without the written order of his parent, guardian, or family physician, or to any person intoxicated, or who is in the habit of getting intoxicated, shall for each offense be fined not less than \$20 nor more than \$100, and imprisoned in the county jail not less than ten nor more than thirty days.”³

§ 269. **Nuisances — Penalty — Bond — Evidence.**—“All places where intoxicating liquors are sold in violation of this act,

¹ R. S., 438, § 4.

² Id., 439, § 5.

³ Id., § 6. The sale of intoxicating liquors to a minor is an offense under this section though the vendor does not know that the purchaser is a minor. *State v. Hartfield*, 24 Wis., 60.

shall be taken, held and be declared to be common nuisances, and all rooms, taverns, eating-houses, bazars, restaurants, drug stores, groceries, coffee-houses, cellars or other places of public resort, where intoxicating liquors are sold, in violation of this act, shall be deemed public nuisances ; and whoever shall keep any such place, by himself, his agent, or servant, shall for each offense be fined not less than \$50 nor more than \$100, and confined in the county jail not less than twenty nor more than fifty days, and it shall be a part of the judgment, upon the conviction of the keeper, that the place so kept shall be shut up and abated until the keeper shall give bond, with sufficient security to be approved by the court, in the penal sum of \$1,000 payable to the People of the State of Illinois, conditioned, that he will not sell intoxicating liquors contrary to the laws of this state, and will pay all fines, costs, and damages assessed against him for any violation thereof ; and in case of a forfeiture of such bond, suit may be brought thereon for the use of the county, city, town, or village, in case of a fine due to either of them. It shall not be necessary in any prosecution under this section to state the name of any person to whom liquor is sold.”¹

§ 270. **Liability for Support, etc.** — “ Every person who shall, by the sale of intoxicating liquors, with or without a license, cause the intoxication of any other person, shall be liable for and compelled to pay a reasonable compensation to any person who may take charge of and provide for such intoxicated person, and two dollars per day in addition thereto for every day such intoxicated person shall be kept in consequence of such intoxication, which sums may be recovered in an action of debt before any court having competent jurisdiction.”²

§ 271. **Suits for Damages by Husband, Wife, Child, etc. — Forfeiture of Lease, etc.** — “ Every husband, wife, child, parent, guardian, employer or other person, who shall be injured in person or property or means of support, by any intoxicated person, or in consequence of the intoxication, habitual or otherwise,

¹ R. S., 438, § 7.

² Id., § 8.

of any person, shall have a right of action in his or her own name, severally or jointly, against any person or persons who shall, by selling or giving intoxicating liquors, have caused the intoxication in whole or in part of such person or persons; and any person owning, renting, leasing or permitting the occupation of any building or premises, and having knowledge that intoxicating liquors are to be sold therein, or who, having leased the same for other purposes, shall knowingly permit therein the sale of any intoxicating liquors, that have caused, in whole or in part, the intoxication of any person, shall be liable, severally or jointly, with the person or persons selling or giving intoxicating liquors aforesaid, for all damages sustained, and for exemplary damages; and a married woman shall have the same right to bring suits and to control the same and the amount recovered, as a *feme sole*; and all damages recovered by a minor under this act shall be paid either to such minor or to his or her parent, guardian or next friend as the court shall direct; and the unlawful sale or giving away of intoxicating liquors shall work a forfeiture of all rights of the lessee or tenant, under any lease or contract of rent upon the premises where such unlawful sale or giving away shall take place; and all suits for damages under this act may be by an appropriate action in any of the courts of this state having competent jurisdiction.”¹

§ 272. **What Liable to Execution — Proceeding to Enforce.** — “For the payment of any judgment for damages and costs that may be recovered against any person in consequence of the sale of intoxicating liquors under the preceding section, the real estate and personal property of such person, of every kind, except such as may be exempt from levy and sale upon judgment and execution, shall be liable; and such judgment shall be a lien upon such real estate until paid; and in case any person shall rent or lease to another any building or premises to be used or occupied, in whole or in part, for the sale of intoxicating liquors, or shall knowingly permit the

¹ R. S., 438, § 9. As to the constitutionality of this section, see *Norris House v. State*, 3 Greene Iowa, 512; *Our House No. 2 v. State*, 4 Greene Iowa, 172.

same to be so used or occupied, such building or premises so used or occupied shall be held liable for, and may be sold to pay any such judgment against any person occupying any such building or premises. Proceedings may be had to subject the same to the payment of any such judgment, which remains unpaid, or any part thereof, either before or after execution shall issue against the property of the person against whom such judgment shall have been recovered; and when execution shall issue against the property so leased or rented, the officer shall proceed to satisfy said execution out of the building or premises so leased or occupied, as aforesaid: *Provided*, that if such building or premises belong to a minor or other person under guardianship, the guardian or conservator of such person, and his real and personal property, shall be liable instead of such ward, and his property shall be subject to all the provisions of this section relating to the collection of the said judgment.”¹

§ 273. **When Suit may be before Justice.** — “When the damages claimed under either the eighth or ninth section of this act do not exceed the sum of two hundred dollars, the action therefor may be prosecuted before a justice of the peace of the proper county, and the judgment may be enforced in the same manner as other judgments recovered before justices of the peace.”²

§ 274. **Indictment or Fine.** — “Any fine or imprisonment mentioned in this act may be enforced by indictment in any court of record having criminal jurisdiction, or the fine above may be sued for and recovered before any justice of the peace of the proper county, in the name of the People of the State of Illinois; and in case of conviction the offender shall stand committed to the county jail until the judgment and costs are fully paid.”³

§ 275. **Shifts.** — “The giving away of intoxicating liquors,

¹ R. S., 438, § 11.

² Id., § 12.

³ Id., § 12.

or other shift or device, to evade the provisions of this act, shall be held to be an unlawful selling."¹

§ 276. **Evidence.** — "In all prosecutions under this act, by indictment or otherwise, it shall not be necessary to state the kind of liquor sold; nor to describe the place where sold; nor to show the knowledge of the principal, to convict for the acts of an agent or servant; and in all cases the persons to whom intoxicating liquors shall be sold in violation of this act, shall be competent witnesses."²

§ 277. **City or Village Ordinance no Defense.** — "It shall be no objection to a recovery under this act that the offense for which the person is prosecuted is punishable under any city, village or town ordinance."³

STATEMENT OF THE OFFENSE OF SELLING LIQUOR WITHOUT A LICENSE.⁴

(Commence as in form on page 112) that C. D., on, etc., at,⁵ etc., in the said county then not having a legal license to keep a dram-shop,⁶ unlawfully and

¹ R. S., 438, § 13; *Allen v. State*, 5 Wis., 329.

² *Id.*, § 14.

³ *Id.*, § 15.

⁴ A warrant cannot issue without an affidavit or complaint. R. S., 640, § 22; *Smith v. Brown*, 6 Chicago Legal News, 392; R. S., 59, Cons. Art. II., § 6. Since the proceeding before a justice is a criminal prosecution, *Ward v. People*, 13 Ills., 635; *Webster v. People*, 14 Ills., 367; but see *Graubner v. City of Jacksonville*, 50 Ills., 87, the constitution gives the accused the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation, and to have a copy thereof. R. S., 60; Cons. Art. II., § 9; *Sullivan v. City of Oneida*, 61 Ills., 243; *Fink v. City of Milwaukee*, 17 Wis., 27, which seems to imply that the nature and cause of the accusation should be stated in writing. *Ante* § 46. For form of complaint in the State of Wisconsin, see *State v. Bielby*, 21 Wis., 204; in Iowa, see *Divine v. State*, 4 Iowa, 444; *State v. Ansaleme*, 15 Iowa, 46.

⁵ It is sufficient if the offense is charged to have been committed in the appropriate county, although it is desirable, but not essential, that the town or city be designated, *Zumoff v. State*, 4 Greene Iowa, 526; *contra*, *House v. State*, 3 Greene Iowa, 513; *State v. Winsfraud*, 37 Iowa, 110.

⁶ This is a sufficient allegation of not having a license. *Cannady v. People*, 17 Ills., 159; *State v. Burns*, 20 N. H., 550; *Allen v. State*, 5 Wis., 329. *

willfully did sell¹ to divers² persons intoxicating liquor³ in less quantities than one gallon,⁴ contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

§ 278. *Evidence of a Sale.*—The sale may be established either by the positive testimony of those who were present at the sale or by circumstances.⁵ And it is not necessary in order to find the defendant guilty, that the liquor was handed to a person who asked for it and that it was paid for or charged to some one.⁶ Evidence that the defendant kept a bar with bottles in it,⁷ or that the defendant kept spirituous liquors in his dram-shop, is proper.⁸ That the witness heard the parties call for brandy, and saw them pour from a bottle handed them and labeled brandy something that looked like brandy, and then drank it, is sufficient evidence that the liquor was brandy.⁹ Whether a sale of one gallon of intoxicating liquor by one not having a license, with an understanding that the purchaser may call for it in such quantities as he wishes, is a fair transaction or a mere evasion, is a question of fact to be determined by the jury.¹⁰ It must be proved that the sale was

¹ It is not necessary to allege that the defendant received a compensation for the liquor. *State v. Downer*, 21 Wis., 274; *Huntermeister v. State*, 1 Iowa, 101; *Clare v. State*, 5 Iowa, 509.

² The name of the person to whom the liquor was sold need not be stated, nor that it is unknown. *Wrocklege v. State*, 1 Iowa, 168; *Zarresseller v. People*, 17 Ills., 101; *Cannady v. People*, 17 Ills., 159; *State v. Gummer*, 22 Wis., 441; *State v. Bielby*, 22 Wis., 204; *Myers v. People*, 67 Ills., 504; *contra*, *State v. Allen*, 32 Iowa, 491.

³ The kind of liquor sold or price paid for it need not be stated. *Zarresseller v. People*, 17 Ills., 101; *Cannady v. People*, 17 Ills., 159; *contra*, as to the price paid, *Divine v. State*, 4 Ind., 240; *Snyder v. State*, 5 Ind., 195; *State v. Miles*, 4 Ind., 577; *Hubbard v. State*, 11 Ind., 554.

⁴ The minimum quantity to be sold without license is one gallon. *Sullivan v. People*, 15 Ills., 233; *Bennett v. People*, 16 Ills., 160; *Zarresseller v. People*, 17 Ills., 101; *Cannady v. People*, 17 Ills., 159.

⁵ *Vallance v. Everts*, 3 Barb., 553; *Com. v. Shaw*, 116 Mass., 8.

⁶ *Kimball v. People*, 20 Ills., 348.

⁷ *People v. Hulbut*, 4 Denio, 133.

⁸ *Vallance v. Everts*, 3 Barb., 553.

⁹ *Baurouse v. State*, 1 Clark, Iowa, 374.

¹⁰ *Baker v. Richardson*, 1 Cowen, 77.

made after the statute or ordinance took effect.¹ And it is erroneous to permit evidence of a greater number of offenses than there are counts in the indictment.²

§ 279. *Sale by Agent, Servant, etc. — Married Woman.* — Where a party permits liquor to be sold which is drank in the building occupied by him, he is as responsible as if he had made the sale himself.³ Or if the sale is made at the employer's place of business by his clerk, servant or agent, in his absence or presence, under circumstances from which the jury have a right to infer that the clerk, servant or agent acted by his authority or permission, such employer is liable.⁴ But in order to convict the employer for the sale of intoxicating liquors, the jury must be satisfied of his permission or assent to the sale and not merely of his knowledge of it.⁵ It is no defense to an indictment for selling liquor without license that the defendant sold it as the clerk, servant or agent of another not having a license,⁶ or that the liquor was sold for medicinal purposes.⁷ Two persons may be jointly indicted and convicted for selling liquor without license,⁸ even if one is in the employ of another as his servant or clerk,⁹ and the judgment upon an indictment is several against each for the

¹ *Newland v. President and Trustees of Aurora*, 14 Ills., 364, 17 Ills., 379; 1 Bish. Cr. P., § 460; *People v. Jenness*, 5 Mich., 305; *People v. Hopson*, 1 Denio, 574.

² *Hodgman v. People*, 4 Denio, 235; *Rex v. Williams*, 6 Car. & P., 626; *Lovell v. State*, 12 Ind., 20.

³ *Jones v. People*, 14 Ills., 197, 198.

⁴ *Hall v. McKechnie*, 22 Barb., 244; *State v. Brown*, 31 Me., 520; *State v. Dow*, 21 Vt., 484; 1 Gray, 481; 3 Iowa, 566; *State v. Stricker*, 33 Iowa, 136; *Com. v. Smith*, 102 Mass., 144.

⁵ *State v. Finan*, 10 Iowa, 20; *Com. v. Putnam*, 4 Gray, 16; *Goods v. State*, 3 Greene Iowa, 566.

⁶ *Schmidt v. State*, 14 Mo., 137; *Roberts v. O'Conner*, 33 Me., 496; *State v. Bugbee*, 22 Vt., 33; *Buttan v. State*, 3 Humph., 203; *Hays v. State*, 13 Mo., 246.

⁷ *State v. Gummer*, 22 Wis., 441; 21 Wis., 274; *contra*, 2 Carter Ind., 658; 19 Mo., 391; and see 9 Bush Ky., 569.

⁸ *State v. Caswell*, 2 Humph., 399; *Ingersol v. Skinner*, 1 Denio, 540; *Hall v. McKechnie*, 22 Barb., 244; *Com. v. Sloan*, 4 Cush., 52.

⁹ *French v. People*, 3 Park. Cr. R., 114.

whole penalty,¹ while in a proceeding by action the penalty is joint and cannot be collected but once.² A married woman is liable for selling intoxicating liquors of her husband, without a license.³

§ 280. **What a Sale.** — A sale is not constituted by an agreement to sell.⁴ There must be a delivery of the liquor.⁵ But the payment of the purchase price need not be actually made, for a sale on credit is within the prohibition of selling, though the law would not enforce the payment.⁶ If the particular drink is mixed with other unknown ingredients and sold under another name, still the act is a sale of the drink.⁷

§ 281. **The License.** — It is not for the prosecution to prove that the defendants had no license at the time of the sale, for since if he has one it is so easy for him to produce it and it being a matter within his particular knowledge, unless he does produce it, it will be presumed that he had none.⁸ The license must be in due legal form⁹ and a certificate that one is licensed is not a license,¹⁰ neither is a parol license sufficient.¹¹ undoubtedly if the power which gives the license omits to make up the proper record of its proceedings, the omission, though reprehensible, does not impair the license.¹² Upon ap-

¹ 1 Bish. Cr. L., § 957; *Com. v. Harris*, 7 Grat., 600.

² *Marsh v. Shute*, 1 Denio, 230; *Curtis v. Hurlbut*, 2 Conn., 309; *Arnold v. Loveless*, 6 Rich., 511; *Conley v. Palmer*, 2 N. Y., 182; *Tracy v. Perry*, 5 N. H., 504; but see *Rex v. Bliasdale*, 4 T. R., 809; *Barad v. State*, 13 Mo., 94.

³ *Rex v. Crofts*, 7 Mod., 397; *Com. v. Murphy*, 2 Gray, 572; *State v. Collins*, 1 McCord, 355; 3 N. H., 207.

⁴ *Pulse v. State*, 5 Humph., 108; *Bancher v. Warren*, 33 N. H., 183.

⁵ *Id.*

⁶ *Emmerson v. Noble*, 32 Me., 380.

⁷ *Com. v. Odlin*, 23 Pick., 275; *Com. v. Bathrick*, 6 Cush., 247; but see *State v. Laffer*, 38 Iowa, 422.

⁸ *Greenl. Ev.*, § 79; *Whart. Cr. L.*, 2434; *Potter v. Deyo*, 19 Wen., 361; *Smith v. Joyce*, 12 Barb., 21; *Pendergast v. City of Peru*, 20 Ills., 51; *Great Western R. R. Co. v. Bacon*, 30 Ills., 347; *Gering v. State*, 1 McCord, 573; *contra*, *Mehan v. State*, 7 Wis., 670.

⁹ *State v. Shaw*, 570.

¹⁰ *Com. v. Spring*, 19; *Pick.*, 396.

¹¹ *Lawrence v. Gracy*, 11 John., 179; *State v. Moore*, 14 N. H., 451.

¹² 29 Me., 442.

plication for a license the licensing power may reject or grant the same in its discretion.¹ The individual licensed can only sell in the place and within the time specified in the license.² If he does otherwise the license affords him no protection.³ The person licensed may sell either by himself or his agent.⁴ A license to two men as partners to keep a dram-shop will authorize one of them to sell after the other has retired from the business;⁵ yet a license given to one partner confers no authority on his co-partner to sell intoxicating liquors.⁶ If one sells intoxicating liquor without a license, no conviction for such sale will authorize any further unlicensed selling.⁷ A license cannot relate back so as to legalize an illegal sale already made.⁸ A person who has a license is bound by any subsequent legislation, to which, therefore he must conform.⁹ If a license is unduly granted, that is, granted contrary to law, it does not protect the holder.¹⁰ It is not necessary for an administrator or an executor to take out a license before selling intoxicating liquors belonging to the estate of the deceased.¹¹

§ 282. **Constitutionality of Act and of Ordinances.**—It is well settled that the statute prohibiting the sale of intoxicating liquor without a license is constitutional.¹² But where a city

¹ R. S., 438, § 3; *State v. Downer*, 21 Wis., 277.

² R. S., 438, § 4; 7 Foster N. H., 289.

³ 2 Bish. Cr. L., 4th Ed., 1131; *Hall's Case*, 8 Grat., 588; *State v. Hughes*, 24 Mo., 147.

⁴ *Com. v. Park*, 1 Gray, 553; *Barnes v. Com.*, 2 Dana, 390; *Thompson v. State*, 5 Humph., 138.

⁵ *State v. Gerhardt*, 3 Jones Law, N. C., 178.

⁶ *Long v. State*, 27 Ala., 32; *contra.*, *Barnes v. Com.*, 2 Dana, 390; 9 Id., 300; *State v. Davis*, 23 Me., 403; and see *Hall's Case*, 8 Grat., 588.

⁷ *State v. McBride*, 4 McCord, 332; *State v. Cassidy*, 1 Richardson, 90.

⁸ *State v. Hughes*, 24 Mo., 147.

⁹ *State v. Fairfield*, 37 Me., 517; 1 Ohio, 15; 38 N. H., 225; 18 Mo., 515.

¹⁰ 1 Jones, N. C., 276; 19 Ark., 688.

¹¹ *Williams v. Troop*, 17 Wis., 463.

¹² *Kittering v. City of Jacksonville*, 50 Ills., 39; *City of East St. Louis v. Wehrung*, 46 Ills., 392; *Jones v. People*, 14 Ills., 196; *Goddard v. Town of Jacksonville*, 15 Ills., 590; *Santo v. State*, 2 Iowa, 165; but see *Geebrick v. State*, 5 Iowa, 492; *Walters v. State*, 5 Iowa, 507; *State v. Bartmeyer*, 31 Iowa, 601.

charter authorized the common council to declare the selling, giving away or the keeping on hand for sale any spirituous or intoxicating liquors, etc., in the city a nuisance, it does not authorize an ordinance making it an offense for any person within the city to have in his possession any intoxicating liquors, etc.¹

§ 283. **Refusal to Grant License not a Defense.**—It is no defense to an indictment for selling liquor without license that the defendant had applied for a license, which was refused solely because the licensing board had determined not to license any sale of spirituous liquors.²

§ 284. **Pleading.**—In Iowa where to an indictment for selling liquor without a license, the defendant pleaded that he had a license, and issue was joined upon that plea, and upon that issue the jury found the defendant guilty, it was held that the plea should have been, “not guilty;” that the state should not have joined issue upon any other plea, and that the verdict and judgment rendered under such an issue should have been arrested.³

¹ *Sullivan v. City of Oneida*, 61 Ills., 242.

² *State v. Downer*, 21 Wis., 274; *Kadgihn v. City of Bloomington*, 58 Ills., 229.

³ *Peters v. State*, 3 Greene Iowa, 74.

SECTION IV.

OFFENSES AGAINST PROPERTY WHICH MAY BE TRIED BEFORE
A JUSTICE OF THE PEACE.

- § 285. Canada Thistles.
286. Continued—Railroads to Destroy.
287. Failing to Protect Castor Beans.
288. Cruelty to Animals.
289. Continued—By Railroads and Carriers.
290. Bull Baiting, Cock Fighting, etc.
291. Unnecessarily Frightening Team by Engineer
292. Injuring or Destroying Baggage.
293. Defacing, etc., Advertisements, etc.
294. Failing to Protect Saltpetre Caves.
295. Bringing Animals Infected with Contagious Disease into this State
or Suffering them to Run at Large.
296. Trespass upon Gardens, etc.
297. Trespass upon Orchards, etc.
298. Setting Fire to Woods, Prairies, etc.
299. Counterfeiting Trade Marks.
300. Simulating Trade Marks.

1. CANADA THISTLES.

§ 285. Provisions of the Statute. — “Whoever shall bring into this state, whether in packing of goods, or in grain or grass seed, or otherwise, any seed of the Canada thistle, and permit the same to be disseminated so as to vegetate on any land in this state, and whoever shall permit any Canada thistle to mature its seed on any land owned or occupied by him so that the same is or may be disseminated, shall be fined not less than ten nor more than one hundred dollars; the fine to be paid to the commissioners of Canada thistles, if any is appointed in the town, precinct, city or village, or otherwise as directed by law.”¹

¹ R. S., 357, § 40.

§ 286. Continued — Railroads to Destroy. — “ If any company, association or person owning, controlling or operating a railroad shall refuse or neglect to dig up and destroy, or take other certain means of exterminating, Canada thistles and other noxious weeds that may at any time be growing upon the right of way, or any other lands of such roads, or appertaining thereto, they shall be fined for each offense not less than fifty nor more than two hundred dollars; the fine to be paid as in the preceding section.”¹

STATEMENT OF THE OFFENSE OF BRINGING INTO THE STATE SEED OF CANADA THISTLES.

(Commence as in form on page 112) that C. D., on, etc., at, etc., in the said county, did unlawfully bring into the said county of — and state of Illinois, certain seed of the Canada thistle, and then and there did permit the same to be then and there disseminated so as to then and there vegetate on certain lands, there situate, lying and being in this said state of Illinois, contrary to the form of the statute in such case made and provided (conclude as in form on page 112).

2. FAILING TO PROTECT CASTOR BEANS.

§ 287. Provisions of the Statute. — “ Whoever plants or raises castor beans without protecting them from the approach of cattle or other stock, by a good and lawful fence, shall be fined not less than three dollars nor more than one hundred dollars, and a like sum for each day he shall allow the same to remain so unprotected after having been once fined : *Provided*, the provisions of this section shall not apply to any county where domestic animals are by law prohibited from running at large.”²

STATEMENT OF THE OFFENSE OF FAILING TO PROTECT CASTOR BEANS.

(Commence as in form on page 112) that C. D., on, etc., at, etc., in said county did raise castor beans, without then and there protecting them from the approach of cattle or other stock by a good and lawful fence, contrary to the form of the statute in such case made and provided (conclude as in form on page 112).

¹ R. S., 358, § 41.

² Id., 358, § 42.

3. CRUELTY TO ANIMALS.

§ 288. Provisions of the Statute. — “Whoever shall be guilty of cruelty to any animal in any of the ways mentioned in this section shall be fined not less than three dollars nor more than two hundred dollars, viz.:

First.—By over-loading, over-driving, over-working, cruelly beating, torturing, tormenting, mutilating, or cruelly killing any animal, or causing or knowingly allowing the same to be done.

Second.—By cruelly working any old, maimed, infirm, sick or disabled animal, or causing, or knowingly allowing the same to be done.

Third.—By unnecessarily failing to provide any animal in his charge or custody, as owner or otherwise, with proper food, drink and shelter.

Fourth.—By abandoning any old, maimed, infirm, sick or disabled animal.

Fifth.—By carrying or driving, or causing to be carried or driven or kept, any animal in an unnecessarily cruel manner.¹

STATEMENT OF THE OFFENSE OF CRUELTY TO ANIMALS.

(Commence as in form on page 112) that C. D., on, etc., at, etc., in said county, was guilty of cruelty to a certain animal, *to wit.*, to a horse by then and there over-loading the said animal, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

§ 289. Continued — By Railroads and Carriers. — “No railroad company or other common carrier, in the carrying or transportation of any cattle, sheep, swine or other animals, shall allow the same to be confined in any car more than twenty-eight consecutive hours (including the time they shall have been upon any other road), without unloading for rest, water and feeding, for at least five consecutive hours, unless delayed by storm or accident, when they shall be so fed and watered as soon after the expiration of such time as may reasonably be

¹ R. S., 359, § 50.

done. When so unloaded, they shall be properly fed, watered and sheltered during such rest by the owner, consignee or person in custody thereof, and in case of their default, then by the railroad company transporting them, at the expense of the said owner, consignee or person in custody of the same; and such company shall have a lien upon the animals until the same is paid. A violation of this section shall subject the offender to a fine of not less than three dollars nor more than two hundred dollars.”¹

STATEMENT OF THE OFFENSE OF ALLOWING CATTLE TO BE CONFINED
MORE THAN TWENTY-EIGHT HOURS IN A CAR.

(Commence as in form on page 112) that the Chicago, Burlington & Quincy Railroad Company, on, etc., at, etc., in the said county, then and there being a railroad company duly incorporated under the laws of this State of Illinois, in then and there carrying and transporting of certain cattle, *to wit*, fifty head of steers, did unlawfully allow the same to be confined in a car more than twenty-eight consecutive hours, without then and there unloading the same, the said railroad company not being then and there delayed by storm or accident, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

§ 290. Continued — Bull-Baiting, Cock-Fighting, etc. — “Whoever shall keep or use, or in any way be connected with or interested in the management of, or shall receive money for the admission of any person to any place kept or used for the purpose of fighting or baiting any bull, bear, dog, cock or other creature, and every person who shall engage, encourage, aid or assist therein, or who shall permit or suffer any place to be so kept or used, and every person who shall visit such place so kept or used, or who shall be found therein, shall be fined not less than three dollars nor more than two hundred dollars.”²

STATEMENT OF THE OFFENSE OF KEEPING A PLACE FOR COCK-FIGHTING.

(Commence as in form on page 112) that C. D., on, etc., at, etc., in the said county, did unlawfully keep a place for the purpose of then and there fighting cocks, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

¹ R. S., 359, § 51.

² Id., § 52.

4. UNNECESSARILY FRIGHTENING TEAM BY ENGINEER.

§ 291. Provisions of the Statute. — The statute provides in substance that any engineer having charge of and running any railroad engine or locomotive, “who shall wantonly or unnecessarily blow the engine or whistle so as to frighten any team, shall be liable to a fine of not less than ten dollars nor more than fifty dollars.”¹

STATEMENT OF THE OFFENSE OF UNNECESSARILY FRIGHTENING A TEAM BY AN ENGINEER.

(*Commence as in form on page 112*) that C. D., on, etc., at, etc., in the said county, then and there being an engineer, and then and there having charge of a railroad engine, did unlawfully, wantonly and unnecessarily blow the said engine whistle, so as then and there to frighten the team of the said A. B., then and there lawfully being, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

5. INJURING OR DESTROYING BAGGAGE.

§ 292. Provisions of the Statute. — “If any baggage-master, express agent, stage-driver, hackman, or any other person, whose duty it is to handle, remove or take care of trunks, valises, boxes, packages or parcels, while loading, transporting, unloading, delivering or storing the same, whether or not in the employ of a railroad, steamboat, or stage company, shall wantonly or recklessly injure or destroy the same, he shall be fined not exceeding two hundred dollars.”²

STATEMENT OF THE OFFENSE OF INJURING BAGGAGE.

(*Commence as in form on page 112*) that C. D., on, etc., at, etc., in the said county, then and there being a baggage-master, and it then and there being the duty of the said C. D. to handle, remove, and take care of trunks, valises, boxes, packages and parcels, while then and there loading, transporting, unloading, delivering and storing the same, did wantonly and recklessly injure the trunk of the said A. B. while the said C. D. was then and there loading, transporting, unloading, delivering and storing the same, as it was then and there his duty to do, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

¹ R. S., 380, § 191.

² Id., § 193.

6. DEFACING, TEARING DOWN, ETC., OF ADVERTISEMENTS, LEGAL NOTICES, ETC.

§ 293. **Provisions of the Statute.**—"Whoever intentionally defaces, obliterates, tears down or destroys, in whole or in part, any copy, transcript or extract of or from any law of the United States, or of this state, or any proclamation, advertisement, or notification set up at any public place by authority of law, or by order of any court, during the time for which the same is to remain set up, shall be fined not exceeding two hundred dollars."¹

STATEMENT OF THE OFFENSE OF TEARING DOWN A LEGAL ADVERTISEMENT.

(Commence as in form on page 112) that E. F., on, etc., at, etc., in the said county, then being one of the constables of the said county, had in his hands an execution issued by L. M., a justice of the peace of said county, on the — day of —, A. D. 18—, upon a judgment then lately entered by the said justice in favor of the said A. B. plaintiff, against C. D. defendant, in a certain action, the subject matters and parties of which the said L. M. had jurisdiction before entering the said judgment by which said execution the said E. F. constable, as aforesaid, was commanded to make of the goods and chattels of the said C. D. the sum of fifty dollars debt and two dollars costs, and for the purpose of making the same, the said E. F. constable, as aforesaid, by virtue of the said execution, afterwards, *to wit.*, on the — day of —, A. D. 18—, levied upon the goods and chattels of the said C. D., and afterwards and on the same day in the county aforesaid, appointed the — day of —, A. D. 18—, at — o'clock in the — noon, as the time, and the residence of the said C. D. as the place, for the sale thereof, and did on the said — day of —, A. D. 18—, by authority of law, give ten days' previous notice of such sale by advertisement in writing, posted up in said county in the vicinity where the said sale was to be made, one of which said advertisements was posted on the outer door of the house of —, an innkeeper of the said county; and that the said C. D. afterwards, *to wit.*, on the — day of —, A. D. 18—, at, etc., in the said county, did unlawfully and intentionally deface, obliterate, tear down and destroy the said advertisement so posted and set up by authority of law on the outer door of the said — as aforesaid, during the time for which the same was to remain posted and set up, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

¹ R. S., 382, § 205; *Faulds v. People*, 66 Ills., 210.

SHORTER FORM.

(Commence as in form on page 112) that C. D., on, etc., at, etc., in the said county, did unlawfully and intentionally deface, obliterate, tear down and destroy a certain advertisement, *to wit.*, a notice of the sale of the property of the said C. D., on an execution set up at a place in said county by authority of law, during the time the same was to remain set up, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

7. FAILING TO PROTECT SALTPETRE CAVES.

§ 294. Provisions of the Statute. — “Whoever works any saltpetre cave, or other place where saltpetre is taken or manufactured, without protecting the same from the approach of cattle or other stock by a good and sufficient fence, shall be fined not less than three dollars, nor more than one hundred dollars, and in a like sum for each day he shall allow the same to remain so unprotected after being once fined.”¹

STATEMENT OF THE OFFENSE OF FAILING TO PROTECT A SALTPETRE CAVE.

(Commence as in form on page 112) that C. D., on, etc., at, etc., in the said county, did work a saltpetre cave without then and there protecting the same from the approach of cattle and other stock by a good and sufficient fence, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

8. BRINGING ANIMALS INFECTED WITH CONTAGIOUS DISEASE INTO THIS STATE OR SUFFERING THEM TO RUN AT LARGE.

§ 295. Provisions of the Statute.—“Any person who shall hereafter knowingly and willfully bring or cause to be brought into this state any sheep or other domestic animals infected with contagious disease, or who shall knowingly and willfully suffer or permit sheep or other domestic animals infected with contagious disease to run at large, shall be fined in any sum not exceeding one hundred dollars, and shall be liable in a civil action for all damages occasioned thereby.”²

¹ R. S., 391, § 257.

² Id., § 258. For statute relating to Texas or Cherokee cattle, see R. S., 141, §§ 12-23; *Newkirk v. Milk*, 62 Ills., 172; *Herrick v. Gray*, 65 Ills., 101.

STATEMENT OF THE OFFENSE OF BRINGING INTO THIS STATE SHEEP INFECTED WITH CONTAGIOUS DISEASE.

(Commence as in form on page 112) that C. D., on, etc., at, etc., in the said county, did unlawfully, knowingly and willfully bring (or "cause to be brought") into this state of Illinois ten sheep then being infected with a contagious disease called (*insert the name of the disease*), contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

9. TRESPASS.

§ 296. Upon Gardens, etc.—"Whoever willfully enters and passes over any garden, yard, or other improved field, after being expressly forbidden so to do by the owner or occupant thereof, shall be fined not exceeding five dollars."¹

STATEMENT OF THE OFFENSE OF TRESPASS UPON A GARDEN.

(Commence as in form on page 112) that C. D., on, etc., at, etc., in the said county, unlawfully and willfully did enter and pass over a certain garden of the said A. B., after being expressly forbidden so to do then and there by the owner and occupant of the said garden, contrary to the form of the statute in such case made, and provided (*conclude as in form on page 112*).

§ 297. Upon Orchards, etc.—"Whoever shall, hereafter, enter the inclosure of any person without leave of the owner, and pick, destroy or carry away any part or portion of the fruit of any apple, pear, peach, or plum, other fruit-tree, vine, or bush, shall be fined not exceeding one hundred dollars."²

STATEMENT OF THE OFFENSE OF PICKING, ETC., OF THE FRUIT OF AN APPLE TREE.

(Commence as in form on page 112) that C. D., on, etc., at, etc., in the said county, did unlawfully enter the inclosure of the said A. B., and then and there, without leave or license of the said A. B., then and there being the owner of the said inclosure, did unlawfully pick (or "destroy" or "carry away") a part or portion of the fruit of an apple-tree, the property of the said A. B., contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

¹ R. S., 392, § 266.

² Id., 392, § 265.

10. SETTING FIRE TO WOODS, PRAIRIES AND OTHER GROUNDS.

§ 298. **Provisions of the Statute.** — “If any person shall, at any time hereafter, willfully and intentionally or negligently and carelessly set on fire, or cause to be set on fire, any woods, prairies or other grounds whatsoever, he shall be fined not less than five dollars nor more than one hundred dollars: *Provided*, this section shall not extend to any person who shall set on fire or cause to be set on fire any woods or prairies adjoining his own farm, plantation or inclosure, for the necessary preservation thereof from accident by fire, between the last day of November and the first day of March, by giving to his neighbors and the owner or occupant of such land, and any person likely to be affected thereby, two days’ notice of such intention: *Provided*, also, this section shall not be construed to take away any civil remedy which any person may be entitled to for any injury which may be done or received in consequence of such firing.”¹

STATEMENT OF THE OFFENSE OF FIRING A PRAIRIE.

(Commence as in form on page 112) that C. D., on, etc., at, etc., in the said county, unlawfully, willfully and intentionally did set on fire a certain prairie there situate, contrary to the form of the statute in such case made and provided (conclude as in form on page 112).

11. COUNTERFEITING TRADE MARKS.

§ 299. **Provisions of the Statute.** — “Whoever knowingly and willfully counterfeits, or causes to be counterfeited, any private stamp, label, or trade-mark, used by a merchant or manufacturer about the sale of his goods, with intent to defraud the purchaser or manufacturer, or sells such goods with such counterfeit stamps, labels or trade-mark thereon, knowing them to be counterfeit, shall, for each offense be fined not exceeding two hundred dollars.”²

¹ R. S., 354, § 18.

² Id., 369, § 115; see *State v. Burge*, 7 Iowa, 225.

STATEMENT OF THE OFFENSE OF COUNTERFEITING TRADE-MARK.

Commence as in form on page 112) that C. D., on, etc., at, etc., in the said county, knowingly and willfully did counterfeit a certain trade-mark, then and there used by the said A. B., then and there being a merchant, about the sale of his the said A. B.'s goods, with intent to defraud the purchaser of the goods having the said trade-mark thereon, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

12. SIMULATING TRADE-MARKS.

§ 300. Provisions of the Statute. — “When any person uses any peculiar name, letters, mark, device or figures, cut, stamped, cast or engraved upon, or in any way attached to or connected with any article manufactured or sold by him, to designate it as an article of a peculiar kind, character or quality, or as manufactured by him; whoever shall, without his consent, use the same or any similar names, letters, marks, devices or figures, for the purpose of falsely representing any article to have been manufactured by him, or to be of the same kind, character or quality as that manufactured or sold by the party rightfully using the same, shall for each offense be fined not exceeding two hundred dollars.”¹

STATEMENT OF THE OFFENSE OF SIMULATING A TRADE-MARK.

(*Commence as in form on page 112*) that the said A. B. on the — day of —, A. D., 18—, used the peculiar mark, *to wit.*, “Moline plow” stamped upon certain plows, then and there manufactured and sold by him, to designate them as articles of a peculiar kind and quality, and as manufactured by him the said A. B.; that C. D. then and there, without the said A. B.'s consent, did unlawfully use the said mark for the purpose then and there of falsely representing certain other plows, then and there manufactured by the said C. D. to have been manufactured by the said A. B., and to be of the same kind and quality as the said plows manufactured, stamped and sold by the said A. B. as aforesaid, contrary to the form of the statute in such case made and provided (*conclude as in form on page 112*).

¹ R. S., 369, § 116 .

SECTION V.

NUISANCES.

- § 301. What a Nuisance at Common Law.
- 302. Provisions of the Statute Relating to Nuisances.
- 303. Continued—Punishment.
- 304. Obstructing and Encroaching upon Roads.
- 305. Evidence—Highway, how Acquired.
- 306. Dedication.
- 307. Town Plat—Effect of Adverse Possession.
- 308. Highway, how Acquired under the Statute.
- 309. Existence of Highway, how Proved.
- 310. Abandonment.
- 311. Street, etc., how Vacated.
- 312. Offense not Committed by Omitting to Obey Orders.

§ 301. What a Nuisance at Common Law. — At common law obstructing public roads¹ and navigable streams,² permitting a public highway³ or bridge⁴ to be grossly out of repair,⁵ polluting streams, etc.,⁶ carrying on offensive trades,⁷ keeping bawdy,⁸ disorderly⁹ or gaming¹⁰ houses, keeping large quantities of gunpowder in populous places,¹¹ persons infected

¹ 13 Serg. & R., 403; *Rex v. Morris*, 1 B. & Ad., 441; *Neff v. Paddock*, 26 Wis., 547; *People v. Cunningham*, 1 Denio, 524.

² *Com. v. Church*, 1 Bar., 105; *Moffett v. Brewer*, 1 Iowa, 348; *Renwick v. Morris*, 7 Hill, 575, 5 Ind., 433.

³ *State v. King*, 3 Ired., 411; *Simpson v. State*, 10 Yerg., 525.

⁴ *Reg. v. Birmingham and Gloucester R. R. Co.*, 9 Car. & P., 469.

⁵ 2 Arch. C. P. & Pl., 989; 1 Bish. Cr. L., 419.

⁶ *Com. v. Webb*, 6 Rand., 726.

⁷ 1 Bish. Cr. L., § 1138; *Lansing v. Smith*, 8 Cowen, 146.

⁸ 4 Black. Com., 168; *Rex v. Williams*, 10 Mod., 63; *People v. Erwin*, 4 Denio, 129.

⁹ 4 Black. Com., 167; *State v. Bertheol*, 6 Blackf., 474; *Rex v. Dixon*, 10 Mod., 336.

¹⁰ *Rex v. Dixon*, 10 Mod., 336; *State v. Haines*, 30 Me., 65.

¹¹ Anonymous, 12 Mod., 342; *People v. Sands*, 1 John., 78

with a contagious disease going abroad,¹ bringing into a public place a glandered horse or an animal otherwise infected with a contagious disease,² collecting crowds of idle persons,³ blasphemy,⁴ profane swearing,⁵ common scolds of the feminine gender,⁶ common barrators,⁷ eavesdroppers,⁸ open lewdness,⁹ frequent and public drunkenness,¹⁰ the exhibition of a monster,¹¹ and the publication, sale or exhibition of obscene books and prints,¹² were severally nuisances and misdemeanors punishable by fine and imprisonment;¹³ and under some circumstances could be abated without resorting to legal proceedings.¹⁴ Some of these offenses are provided for by statute and are elsewhere considered.

§ 302. **Provisions of the Statute Relating to Nuisances.** — Under our statute it is a public nuisance:

1. To cause or suffer the carcass of any animal or any offal, filth or noisome substance to be collected, deposited or to remain in any place, to the prejudice of others.

2. To throw or deposit any offal or any other offensive matter, or the carcass of any animal, in any water course, lake, pond, spring, well or common sewer, street or public highway.

3. To corrupt or render unwholesome or impure, the water of any spring, river, stream, pond or lake, to the injury or prejudice of others.

4. To obstruct or impede, without legal authority, the passage of any navigable river or waters.

¹ *Rex v. Vantandillo*, 4 M. & S., 73; *Rex v. Burnett*, 4 M. & S., 272.

² *Reg. v. Henson*, 18 Eng. L. & Eq., 107.

³ *Baker v. Com.*, 19 Penn., 412; *Com. v. Smith*, 6 Cush., 80.

⁴ 1 Bish. C. L., § 498.

⁵ *Id.*; *Com. v. Pray*, 13 Pick., 359.

⁶ 4 Black. Com., 168; 2 Arch. C. P. & Pl., 997.

⁷ *James v. Com.*, 12 Serg. & R., 230; *Com. v. Davis*, 11 Pick., 432.

⁸ 4 Black. Com., 167; *State v. Williams*, 2 Tenn., 168.

⁹ 2 Arch. C. P. & Pl., 1006; *Smith v. State*, 1 Humph., 396.

¹⁰ *State v. Rose*, 32 Mo., 560, 561; *Knowles v. State*, 3 Day, 103.

¹¹ *Harring v. Walrond*, 2 Cha. Ca., 110.

¹² *Com. v. Holmes*, 17 Mass., 376; *Com. v. Sharpless*, 2 Serg. & R., 91.

¹³ 1 Bish. Cr. L., §§ 1071-1074; 2 Arch. C. P. & Pl., 980-1020.

¹⁴ *Moffett v. Brewer*, 1 Greene Iowa, 348.

5. To obstruct or encroach upon public highways, private ways, streets, alleys, commons, landing-places, and ways to burying-places.

6. To carry on the business of manufacturing gunpowder, nitro-glycerine, or other highly explosive substance, or mixing, or grinding the materials therefor in any building within twenty rods of any valuable building erected at the time such business may be commenced.

7. To establish powder magazines near incorporated towns, at a point different from that appointed according to law by the corporate authorities of the town, or within fifty rods of any occupied dwelling-house.

8. To erect, continue or use any building or other place for the exercise of any trade, employment or manufacture, which, by occasioning noxious exhalations, offensive smells, or otherwise, is offensive or dangerous to the health of individuals or of the public.

9. To advertise wares or occupation, by painting notices of the same on, or affixing them to, fences or other private property, or on rocks or other natural objects, without the consent of the owner, or, if in the highway or other public place, without permission of the proper authorities: *Provided*, that nothing in this section contained shall be construed to prevent the municipal authorities of any incorporated city, town or village from declaring what shall be nuisances and abating the same within their limits.¹

§ 303. *Continued — Punishment.*— “Whoever causes, erects or continues any such nuisance shall for the first offense be fined not exceeding one hundred dollars, and for a subsequent offense shall be fined a like amount, and confined in the county jail not exceeding three months. Every such nuisance, when a conviction therefor is had in a court of record, may, by order of the court before which the conviction is had, be abated by the sheriff or other proper officer, at the expense of the defendant, and it shall be no defense to any proceeding under

¹ R. S., 385, § 221

this section that the nuisance is erected or continued by virtue or permission of any law of this state."¹

STATEMENT OF THE OFFENSE OF A NUISANCE BY SUFFERING A NOISOME SUBSTANCE TO BE DEPOSITED.

(Commence as in form on page 112) that C. D., on the — day of —, A. D. 18—, and continually² from the said day to the time of making this affidavit, at, etc.,³ in the said county, did cause and suffer the carcass of an animal and a large quantity of offal, filth and noisome substance, then, and during all of the said other time, and there to be collected, deposited and remain near the dwelling-houses of E. F., G. H. and the said A. B., there situate, and being then, and during all of the said time, and there, to the prejudice of the said E. F., G. H., A. B. and others, and to the common nuisance⁴ of all the people there lawfully being and abiding (conclude as in form on page 112).

STATEMENT OF THE OFFENSE OF THROWING THE CARCASS OF AN ANIMAL INTO A POND.

(Commence as in form on page 112) that C. D., on, etc., at, etc., in said county, did unlawfully throw the carcass of an animal, *to wit.*, a dead hog, into a certain pond commonly called —, there situate (conclude as in form on page 112).

§ 304. **Obstructing and Encroaching upon Roads.**— To obstruct or encroach upon a public highway is indictable⁵ as a public nuisance,⁶ though a justice of the peace has jurisdiction to try

¹ R. S., 385, § 222.

² It is sufficient to say that the defendant erected and thence continually, etc., maintained the nuisance. Our House No. 2 *v. State*, 4 Greene Iowa, 172; *Baugh v. State*, 14 Ind., 29; *Ashbrook v. Com.*, 1 Bush, 139. The words "on the — day of —, A. D. 18—, and on divers other days and times, between that day and the day of," etc., are sometimes used. 2 Arch. C. P. & Pl., 980. And if the prosecutor does not desire to have the nuisance abated, there is no necessity of alleging that it is continuing. *State v. Hull*, 31 Me., 84; *State v. Shilling*, 14 Iowa, 456.

³ It is sufficient to state the town or city in which the nuisance was maintained, without being any more definite as to the place. *Jenks v. State*, 17 Wis., 665.

⁴ The authorities are conflicting as to whether an indictment should conclude "to the common nuisance," etc. 2 *Bish. Cr. P.*, §§ 862-864.

⁵ R. S., 385, § 221, Sub. 5; *Sweeny v. People*, 28 Ills., 208; *Leech v. Waugh*, 24 Ills., 228; *Dimon v. People*, 17 Ills., 416; *Martin v. People*, 13 Ills., 341, 23 Ills., 395; but see *Town of Havana v. Biggs*, 58 Ills., 483.

⁶ R. S., 385, § 221, Sub. 5; *Neff v. Paddock*, 26 Wis., 547.

the first offense, but not the second.¹ Probably the provisions for the punishment of these offenses, contained in the road laws of 1873,² are impliedly repealed by the revision of the criminal law of 1874 providing for their punishment.³ Under the former statute, somewhat similar to the present, it was held that the continuing of an obstruction was a different offense from that of obstructing a road⁴ and was not indictable, the only remedy supposed to be proper being by a civil proceeding to recover the penalty for continuing the obstruction.⁵

STATEMENT OF THE OFFENSE OF OBSTRUCTING A PUBLIC HIGHWAY.⁶

(Commence as in form on page 112) that C. D., on, etc., at, etc., in the said county, did unlawfully⁷ erect and build a fence in and across the public highway leading from the city of — in the said county of — and state of Illinois to the village of — in the said county⁸ on the northwest quarter of section — in township — north of the base line and range — east of the principal meridian, and did thereby then and there obstruct the said public highway, contrary to the form of the statute in such case made and provided (conclude as in form on page 112).

§ 305. Evidence. — Highway, how Acquired. — A public highway may be acquired by condemnation under the statute,⁹ by

¹ R. S., 385, § 221; Id., 405, § 381.

² R. S., 921, 922, §§ 58, 59, 60; Id., 939, §§ 151, 152.

³ R. S., 385, 386, §§ 221, 222.

⁴ Lowe v. People, 28 Ills., 518.

⁵ Sweeny v. People, 28 Ills., 208.

⁶ Dimon v. People, 17 Ills., 416.

⁷ In Iowa an indictment which charged that the defendant willfully obstructed the public road (describing it) contrary to law was held to sufficiently aver that the act charged was unlawfully done. Capps v. State, 4 Iowa, 503.

⁸ The description of the road is material and must be proved as laid. A description of a road from A. to B., is sufficient. Martin v. People, 23 Ills., 395; Dimon v. People, 17 Ills., 416; Harrow v. State, 1 Iowa, 439; Capps v. State, 4 Iowa, 502. If, however, a local description sufficient to identify and fix the precise point of obstruction is given, as well as the termini of the road, the latter may be disregarded, and proof of the existence of the road at the place of obstruction is sufficient. Houston v. People, 63 Ills., 185; Harrow v. State, 1 Iowa, 439.

⁹ R. S., 923, §§ 69-97; Id., 934, §§ 136-150.

a grant from the owner,¹ by prescription² or by dedication to and acceptance by the public.³ After twenty years user under a claim of right by the public, a grant will be presumed,⁴ and the existence of the public highway be established by prescription,⁵ but the travel must be confined to a specific line or way.⁶

§ 306. **Dedication.**—To constitute a dedication, there must be an intention to make it by the owner of the fee and also an acceptance.⁷ The intention on the part of the owner may be manifested in writing, by declarations or by acts, and if the declarations are without writing the dedication is not within the statute of frauds;⁸ but the intention must be unequivocal and satisfactorily proven, and the acceptance must appear. Where the public are the donees of the easement, this is usually manifested by acts, such as taking charge of, using⁹ and re-

¹ *Grube v. Nichols*, 36 Ills., 92.

² *Id.*; *Dimon v. People*, 17 Ills., 416; *Daniels v. People*, 21 Ills., 442; *Gentlemen v. Soule*, 32 Ills., 271; *Town of Lewiston v. Proctor*, 27 Ills., 417; *Houston v. People*, 63 Ills., 185.

³ *Marcy v. Taylor*, 19 Ills., 634; *Daniels v. People*, 21 Ills., 439; *City of Bellville v. Stookey*, 23 Ills., 442; *Grube v. Nichols*, 36 Ills., 92; *Trickey v. Schlader*, 52 Ills., 78; *City of Peoria v. Johnston*, 56 Ills., 49; *Town of Havana v. Biggs*, 58 Ills., 483; *Field v. Carr*, 59 Ills., 198.

⁴ *Grube v. Nichols*, 36 Ills., 92; *Daniels v. People*, 21 Ills., 442; *Town of Lewiston*, 27 Ills., 414; *Blute v. Scribner*, 23 Wis., 357; *Lemon v. Hayden*, 13 Wis., 159; *Hanson v. Taylor*, 23 Wis., 547.

⁵ *Gentleman v. Soule*, 32 Ills., 278.

⁶ *Id.*; *Houston v. People*, 63 Ills., 185.

⁷ *City of Oswego v. The Oswego Canal Co.*, 6 N. Y., 257; *Kelley v. City of Chicago*, 48 Ills., 389; *People v. Com. of Highways*, 52 Ills., 498; *Gardiner v. Tisdale*, 2 Wis., 153; *City of Peoria v. Johnston*, 56 Ills., 49; *Town of Havana v. Biggs*, 58 Ills., 483; *Gentleman v. Soule*, 32 Ills., 279; *City of Milwaukee v. Davis*, 6 Wis., 377; *Bushnell v. Scott*, 21 Wis., 451; *Harding v. Town of Hale*, 61 Ills., 193; *Field v. Carr*, 59 Ills., 198; *Id.*, 492; *Bartran v. West*, 23 Wis., 416; *Buchanan v. Curtis*, 25 Wis., 99; *State v. Tucker*, 36 Iowa, 485.

⁸ *Warren v. Town of Jacksonville*, 15 Ills., 240; *Alvord v. Ashley*, 17 Ills., 369; *Tuckey v. Schlader*, 52 Ills., 79; *Town of Havana v. Biggs*, 58 Ills., 483; *Gentleman v. Soule*, 32 Ills., 279; *Field v. Carr*, 59 Ills., 198; *Connehan v. Ford*, 9 Wis., 240.

⁹ *Alvord v. Ashley*, 17 Ills., 363; *People v. Com. of Highways*, 52 Ills., 498; *Kelley v. City of Chicago*, 48 Ills., 388; *Buchanan v. Curtis*, 25 Wis., 99.

pairing the highway by the proper authorities.¹ But it cannot be essential to the acceptance that they should repair the road, for it might never require repairing. Any other act on the part of the public which manifests an intention to accept, such as the public travel and use as a highway, is as satisfactory evidence of the acceptance as repairing by the officers.² A party is estopped from denying the dedication from the acquiescence in the using and repairing of the road by the public, either of himself³ or of his grantor, though it be the Government.⁴ If a road has been traveled by the public for eight or nine years, such fact does not raise the presumption that the same is legally established unless there is evidence of the owner's intention to dedicate it to the public.⁵ It does not conclusively follow, because a person when he fenced his land left out a strip the width convenient for a road, that he designed to dedicate it to the public for that purpose, though such fact is strong evidence of such design. If at the time he fenced out the strip he actually intended to dedicate it for a public road, and the dedication is accepted by the public, he cannot subsequently change his purpose and resume the grant.⁶ Twenty years is not required to complete a dedication, for the moment it is accepted, if within ever so short a time as a day or year or ten years, the dedication is irrevocable,⁷ though at any time before acceptance it may be revoked,⁸ and from the time of the acceptance it becomes a public road⁹ and continues such unless discontinued

¹ *Gentleman v. Soule*, 32 Ills., 279; *Alvord v. Ashley*, 17 Ills., 363; *Daniels v. People*, 21 Ills., 439; *Grube v. Nichols*, 36 Ills., 97; *People v. Com. of Highways*, 52 Ills., 501.

² *Inglehart v. Hobart*, 19 Ills., 637; *Holdane v. Trustees of the Village of Cold Springs*, 23 Barb., 103; *People v. Com. of Highways*, 52 Ills., 501.

³ *Alvord v. Ashley*, 17 Ills., 369; *Trickey v. Schlader*, 53 Ills., 78.

⁴ *Id.*, *Dimon v. People*, 17 Ills., 416.

⁵ *Grube v. Nichols*, 36 Ills., 97; *Town of Havana v. Biggs*, 58 Ills., 483; *Harding v. Town of Hale*, 61 Ills., 193.

⁶ *Grube v. Nichols*, 36 Ills., 97; *Leech v. Waugh*, 24 Ills., 228.

⁷ *Marcy v. Taylor*, 19 Ills., 634; *Buchanan v. Curtis*, 25 Wis., 99.

⁸ *Badeau v. Mead*, 14 Barb., 328; *Bissell v. New York C. R. R. Co.*, 26 Barb., 630.

⁹ *Proctor v. Town of Lewiston*, 25 Ills., 153.

or abandoned by the public.¹ A street in an unincorporated town or village may be dedicated in the same manner as a road in the country, and when thus dedicated and accepted becomes a public highway.²

§ 307. **Town Plat — Effect of Adverse Possession.** — The acknowledgment and recording of a town plat is the highest evidence of the dedication of the streets and alleys marked upon it.³ And such streets and alleys must pursue the width given them by the plat, until changed by the proper authority.⁴ The ground for the street should be properly indicated on the town plat, and other requisitions of the statute should be complied with, to enable the city or town and others to enforce the opening of such streets.⁵ Long and continued possession adverse to the claim of the public may be shown to repel the presumption of dedication sought to be established by equivocal or doubtful acts of the owner.⁶

§ 308. **Highway, how Acquired under the Statute.** — A substantial compliance with the requirements of the statute in laying out a highway, if nothing fundamental is omitted, is all that is requisite; the strictest possible compliance with the statute is not demanded.⁷ Formerly in counties under township organization the statute requiring the petition for a new road to designate the point of commencement⁸ would not permit any deviation by the commissioners from the

¹ *Town of Lewiston v. Proctor*, 27 Ills., 417; *Dimon v. People*, 17 Ill., 422; *Champlin v. Morgan*, 20 Ills., 181.

² *Leech v. Waugh*, 24 Ills., 228, 28 Ills., 491.

³ *Trustees v. Havens*, 11 Ills., 554; *Hunter v. Middleton*, 13 Ills., 50; *Waugh v. Leech*, 28 Ills., 491; *Godfrey v. City of Alton*, 13 Ills., 23; *City of Peoria v. Johnston*, 56 Ills., 45; *Carter v. City of Chicago*, 57 Ills., 283; *City of Milwaukee v. Davis*, 6 Wis., 377; *Trustees, etc., v. Walsh*, 57 Ills., 363; *City of Belleville v. Stookey*, 13 Ills., 441; *Yates v. Judd*, 18 Wis., 119; *Williams v. Smith*, 22 Wis., 594; but see 32 Wis., 434; 27 Wis., 492.

⁴ *Waugh v. Leech*, 28 Ills., 491.

⁵ *City of Bellville v. Stookey*, 23 Ills., 441.

⁶ *Id.*, 444; *City of Peoria v. Johnston*, 56 Ills., 45.

⁷ *Town v. Town of Blackberry*, 2d Ills., 138; *Austin v. Allen*, 6 Wis., 134; but see *Shinkle v. Magill*, 53 Ills., 423; *Haywood v. Collins*, 60 Ills., 328; *Dolphin v. Pedley*, 27 Wis., 469.

⁸ *Laws 1861*, 249, §§ 51, 55.

point so fixed;¹ but under the present statute the commissioners are permitted to make changes "between the termini of the road described in the petition, as the convenience and interest of the public in their judgment may require."² The provisions of the statute requiring the commissioners to meet to hear reasons for or against the road within twenty days after the expiration of the twenty days required for posting copies of the petition³ is mandatory and not merely directory, and must be complied with.⁴ Notice must be given as required by the statute of the meeting of the commissioners,⁵ for it is essential to their jurisdiction, and the want of it will vitiate their proceedings.⁶ And before a new road can be opened or an old one changed, there must be a report and survey. These and a plat of the road must accompany the order of the commissioners declaring such highway opened, and, with the petition, should be filed with the town clerk, who should note the time of filing. But a mistake of the clerk in the time of filing may be shown.⁷ The statute does not require the notice of the meeting for the purpose of hearing reasons for or against the establishing of the road to be filed with the town clerk.⁸ The final order reciting that the proper notices were given, is the highest and best evidence, it seems, of such fact.⁹ And after the owner has joined in the petition and released all claim to damages,¹⁰ or has accepted the damages allowed by law for opening a highway, it is too late for him or his grantee to declare the proceedings for opening it void,

¹ *Shinkle v. Magill*, 58 Ills., 422.

² R. S., 924, § 75.

³ *Id.*, § 72.

⁴ *Shinkle v. Magill*, 58 Ills., 422; *Com. v. Harper*, 38 Ills., 104; *Wood v. Commissioners of highways*, 62 Ills., 391.

⁵ R. S., 924, §§ 72, 73.

⁶ *Com. v. Harper*, 38 Ills., 104; *Keech v. People*, 22 Ills., 478; *State v. Langer*, 29 Wis., 68; but see *Wells v. Hicks*, 27 Ills., 345.

⁷ R. S., 627, § 89; *Town v. Town of Blackberry*, 29 Ills., 138; *Damp v. Town of Dane*, 29 Wis., 419; *Isham v. Smith*, 21 Wis., 32.

⁸ *Shinkle v. Magill*, 58 Ills., 422.

⁹ *Id.*

¹⁰ *Trickey v. Schlader*, 52 Ills., 78.

for it amounts substantially to a dedication of the road.¹ Proof that the signers of a petition for laying out a highway are freeholders, where the question comes collaterally in issue, may be made by parol; documentary evidence not being absolutely indispensable in such cases.²

§ 309. **Existence of Highway, how Proved.** — The existence of a public highway or a common street acquired by prescription³ or by dedication,⁴ and its location,⁵ may be proved by parol. Proof that the road is used and traveled by the public as a highway, and is recognized and kept in repair by the proper officers, furnishes a legal presumption, liable to be rebutted, that such road is a public highway.⁶ But if the road was acquired by condemnation under the statute, documentary evidence is the best, and therefore required.⁷ According to some of the earlier decisions, when an order establishing a road is introduced in evidence, it is unnecessary in the first instance to go farther and show that the previous steps required by statute have been taken.⁸ But since nothing will be presumed in favor of a court of inferior or limited jurisdiction,⁹ a special power granted by statute, affecting the rights of individuals, and which divests the title to real estate, ought to be strictly pursued and should appear to be so on the face

¹ *Town v. Town of Blackberry*, 29 Ills., 138; *State v. Langer*, 29 Wis., 69; 22 Wis., 215.

² *Austin v. Allen*, 6 Wis., 134.

Grube v. Nichols, 33 Ills., 93; *Eyman v. People*, 1 Gilm., 8; *Town of Lewiston v. Proctor*, 27 Ills., 417; *Dimon v. People*, 17 Ills., 416.

⁴ *Dimon v. People*, 17 Ills., 417; *Eyman v. People*, 1 Gilm., 10.

⁵ *Eyman v. People*, 1 Gilm., 4; *Town of Lewiston v. Proctor*, 27 Ills., 417; *Warren v. President, etc., of the Town of Jacksonville*, 12 Ills., 236; *Nealy v. Brown*, 1 Gilm., 10; *Town of Havana v. Biggs*, 58 Ills., 483; *Hiner v. People*, 34 Ills., 297.

⁶ *Eyman v. People*, 1 Gilm., 8; *Nealy v. Brown*, 1 Gilm., 10.

⁷ *Town v. Town of Blackberry*, 29 Ills., 138; *Com. v. Harper*, 38 Ills., 104; but see *Grube v. Nicholas*, 36 Ills., 93.

⁸ *Nealy v. Brown*, 1 Gilm., 10; *Ferris v. Ward*, 4 Gilm., 499; *Dumoss v. Francis*, 15 Ills., 546.

⁹ *Shufeldt v. Buckley*, 45 Ills., 223; *Peacock v. Bill*, 1 Saund., 74; *Wells v. Mason*, 4 Scam., 89; *Kenny v. Greer*, 13 Ills., 443; *Clark v. Harkness*, 1 Scam., 57; *Von Kettler v. Johnson*, 57 Ills., 109.

of the proceedings.¹ The correctness of these decisions may well be doubted.² Until the road has been legally opened an indictment for obstructing it will not lie.³

§ 310. *Abandonment.* — Where the fact appears with others that the road has not been repaired by the public,⁴ or that the public have ceased to travel over it, and have acquired another road which accommodates the public travel, a jury will be warranted in presuming an abandonment of the first road, and it is error to instruct the jury that the new road must accommodate the public equally as well as the former road.⁵ Evidence that the supervisors have ordered the defendant to open the road and remove the obstruction, is competent to show that the road has not been abandoned.⁶ The act of an individual obstructing a public road cannot divest the public of its rights in respect to the road, unless submitted to for such a period of time as to raise a fair presumption of abandonment.⁷ Twenty years' adverse possession and complete non-user of a road or street by the public for that time affords a presumption of the extinguishment of the rights of the public to such road or street.⁸ But public rights in roads and streets are not barred by our seven years' statute of limitations.⁹

§ 311. *Street, etc., how Vacated.* — The corporate authorities of any town or city have the power "to vacate or close any street, alley or public ground or any portion of the same," by a vote of three-fourths of the aldermen or trustees,¹ and a road

¹ *Smith v. Hileman*, 1 Scam., 325; *Garret v. Wiggins*, 1 Scam., 337; *Day v. Cushman*, 1 Scam., 475; *Haywood v. Collins*, 60 Ills., 329.

² *Com. v. Harper*, 38 Ills., 104.

³ *Keech v. People*, 22 Ills., 473; 29 Ills., 307.

⁴ *Town of Lewiston v. Proctor*, 27 Ills., 418.

⁵ *Grube v. Nichols*, 36 Ills., 93; *City of Peoria v. Johnston*, 56 Ills., 45; *Gentleman v. Soule*, 32 Ills., 272; *Town of Lewiston v. Proctor*, 27 Ills., 414; *Chaplin v. Morgan*, 20 Ills., 181; *Gardener v. Tisdale*, 2 Wis., 154.

⁶ *Martin v. People*, 13 Ills., 341.

⁷ *Powers v. Watkins*, 58 Ills., 380.

⁸ *City of Peoria v. Johnston*, 56 Ills., 51.

⁹ *City of Alton v. Illinois Transportation Co.*, 12 Ills., 38; *City of Peoria v. Johnston*, 56 Ills., 52.

may be discontinued by the commissioners of the highways on the proper petition.²

§ 312. **Offense not Committed by Omitting to Obey Orders.** — In a prosecution under the statute for obstructing a highway it must be shown that some act has been done by the defendant in violation of the statute. A mere omission to do some act or obey an order of the commissioners of highways will not warrant a conviction.³

¹ R. S., 1092, § 1; Id., 218, § 62, Sub. 7.

² Id., 924, §§ 70, 73, 75.

³ *Wiley v. Town of Brimfield*, 59 Ills., 307.

CHAPTER IV.

SPECIFIC OFFENSES.

- I. TREASON.
- II. HOMICIDE.
 - 1. Murder.
 - 2. Manslaughter.
- III. OFFENSES AGAINST PERSONS.
 - 1. Abortion.
 - 2. Abduction.
 - 3. Assault with Intent to Commit a Felony
 - 4. Assault with a Deadly Weapon.
 - 5. Concealing Death of Bastard
 - 6. Criminal Carelessness.
 - 7. Cruelty to Children.
 - 8. Dueling.
 - 9. False Imprisonment.
 - 10. Kidnapping.
 - 11. Mayhem.
 - 12. Poisoning.
 - 13. Rape.
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- IV. OFFENSES AGAINST PROPERTY.
 - 1. Arson and Burning.
 - 2. Burglary.
 - 3. Embezzlement.
 - 4. Graves, Graveyards and Cemeteries.
 - 5. Larceny.
 - 6. Malicious Mischief.
 - 7. Altering and Defacing Brands with Intent to Steal, etc.
 - 8. Receiving and Restoring Stolen Property.
 - 9. Robbery.
 - 10. Trespass.
- V. FORGERY, COUNTERFEITING AND KINDRED OFFENSES.
 - 1. Forgery.
 - 2. Counterfeiting.
 - 3. Having in Possession Counterfeit Coin, Forged and Counterfeit Public Securities, Bank Bills, etc.
 - 4. Making or Knowingly Having in Possession Counterfeiting Tools.

5. Forging and Counterfeiting Seals and Signatures of Office.

VI. CHEATING, SWINDLING AND DEFRAUDING.

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2. Swindling by Cards, Slight of Hand, etc.
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5. Falsely Personating another.
6. Frauds.
7. Fraudulent Stock.
8. Fraudulent Sale of Lands.
9. Fraudulent Conveyances.
10. Fraudulent Acknowledgment.
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VII. OFFENSES AGAINST PUBLIC MORALITY, HEALTH AND PUBLIC POLICY.

1. Adulteration.
2. Adultery.
3. Bigamy.
4. Circulating Obscene Books, etc.
5. Currency Unauthorized.
6. Gaming Houses.
7. Gaming in a Tavern.
8. Gaming Decoys.
9. Gambling in Grain, etc.
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VIII. OFFENSES AGAINST THE PUBLIC JUSTICE.

1. Bribery.
2. Conspiracy.
3. Escape.
4. Falsely Assuming an Office.
5. Misconduct of Officers.
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8. Witnesses.

IX. OFFENSES AGAINST THE PUBLIC PEACE AND TRANQUILLITY.

1. Extortion by Threats.
2. Intimidation.
3. Libel.
4. Racing.
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7. Suppression of Unlawful Assemblies.
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X. ACCESSORIES TO CRIMES, ATTEMPTS TO COMMIT OFFENSES AND OFFENSES AT COMMON LAW.

1. Accessories to Crimes.
2. Attempting to Commit an Offense.
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SECTION I.

TREASON.

§ 313. Who can Commit.

314. Definition and Punishment.

315. Misprison of Treason.

316. Evidence Required—Allegiance.

317. Levying War.

318. Who Guilty of Treason.

319. Adhering to the Enemies of the Government.

320. Time—Place—Proof that the Persons Adhered to were Enemies—
Number of Witnesses.

§ 313. Who can Commit. —“Crimes against the Government and the people shall consist in treason and misprison of treason, and can only be committed by persons owing allegiance to the state.”¹

§ 314. Definition and Punishment. — “Treason shall consist in levying war against the Government and people of this state in the same, or being adherent to the enemies of this state, giving them aid, advice and comfort in this state or elsewhere. Any person being thereof duly convicted of open deed, by two or more witnesses, or voluntary confession in open court, shall suffer the pains and penalty of death; and when the overt act of treason shall be committed without the limits of this state, the person charged therewith may be arrested, tried and punished in any county in this state, within the limits of which he may be found; and the offense may be charged to have been committed in the county where he may be arrested.”²

§ 315. Misprison of Treason. — “Misprison of treason shall

¹ R. S., 392, § 263.

² Id., § 264.

consist in the knowledge and concealment of treason, without otherwise assenting to or participating in the crime. Any person found guilty thereof shall be imprisoned in the penitentiary not exceeding two years."¹

STATEMENT OF THE OFFENSE OF TREASON.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, then and there being a citizen and resident of, and owing allegiance and fidelity to, the said state of Illinois, not weighing the duty of the said allegiance and fidelity, but then and there wickedly² devising and intending the peace of the Government and the people of the said state to disturb, with divers false traitors to the number of one thousand persons, whose names to the said A. B. are unknown,³ being persons then and there owing allegiance to the said state, armed and arrayed in a warlike manner,—that is to say, with guns, swords, clubs, staves, and other warlike weapons, as well offensive as defensive,—unlawfully, maliciously and traitorously assembled⁴ and joined together against the Government and the people of the said state of Illinois, did unlawfully, maliciously and traitorously,⁵ levy war against the Government and people of the said state of Illinois within the said state, contrary to the duty of the allegiance of him the said C. D.,⁶ against the peace and dignity of the people of this said state of Illinois⁷ (conclude⁸ as in form on page 35).

§ 316. Evidence Required — Allegiance. — The prosecutor must prove : 1. *That the defendant owed allegiance to the*

¹ R. S., 392, § 265.

² The statement of an overt act is necessary, and it must be proved as alleged. *Vaughn's Case*, 2 Salk., 634; 2 Whart. Cr. L., § 2741.

³ The names of the co-conspirators must be stated if known; if not, it must be stated that their names are unknown. 2 Bish. Cr. P., § 1033.

⁴ Laying several overt acts in one count for high treason, will not make it bad for duplicity. *Rex v. Jenour*, 7 Mod., 400; *Rex v. Benfield*, 2 Burr., 980.

⁵ An indictment must allege the offense to have been committed "traitorously." 2 Chitty Cr. L., 63.

⁶ An indictment must charge that the traitorous act was done contrary to the defendant's duty of allegiance. *Rex v. Tucker*, Comb, 257.

⁷ All indictments must conclude "against the peace and dignity of the said state of Illinois." R. S., 73, Con. Ills., Art. VI., § 33; but it has not been customary to conclude with these words in complaints.

⁸ Since treason is an offense at common law in each state, *Resp v. Chapman*, 1 Dall., 56; *People v. Lynch*, 11 John., 549, it is not necessary to conclude "against the form of the statute," etc.; *ante* p. 37, n. 1.

state : 2. That he levied war against the Government and people of this state or adhered to the enemies of this state, giving them aid, advice and comfort. To prove that the defendant owed allegiance, it may be shown that he was a citizen of the state; then he will owe allegiance to it whether he was absent temporarily or not.¹ If the defendant is an alien, proof that he resided in the state with his family and effects, or that he had gone abroad and left his family and effects here, is sufficient to show that he owed allegiance to the state.² The allegiance of aliens is local and terminates when they leave the state with their families and effects.³

§ 317. **Levying War.** — Any assembling of men for the treasonable purpose and with the intent of overthrowing the Government of the state is levying war, within the meaning of the statute.⁴ Actual fighting need not be proved,⁵ enlisting and marching being enough without coming to battle.⁶ But the mere enlisting men to serve against the Government, without getting them together, is not sufficient to constitute a levying of war.⁷ And the bare assembling of men, if not of a warlike character and with the intent and for the purpose of overthrowing the Government, comes short of the overt act which is required.⁸ A mere conspiracy to overthrow the Government, however atrocious such conspiracy may be, does not of itself amount to the crime of treason.⁹

¹ 1 Black. Com., 370, 371; *Rex v. Story*, Dyer R., 298, 30; *Foster's Crown L.*, 59; 2 Kent Com., 42-50; *U. S. v. Williams*, 2 Cranch, 82*n*; *Murray v. The Charming Betsey*, 2 Cranch, 64.

² 3 Greenl. Ev., § 239; 23 Law R., 705; *U. S. v. Villatto*, 2 Dall., 370; *U. S. v. Willberger*, 5 Wheat., 76, 97.

³ 2 Bish. Cr. L., § 1235.

⁴ *Ex parte Bollman*, 4 Cranch, 136; *U. S. v. Burr*, 4 Cranch, 469; *People v. Lynch*, 11 John., 549; *Resp. v. Carlisle*, 1 Dall., 35; *U. S. v. Vigol*, 2 Dall., 246; *U. S. v. Mitchell*, 2 Dall., 348.

⁵ *Foster*, 218, 1 Hale, 144.

⁶ *Rex v. Vaughan*, 2 Saik., 634; 2 Burr's Tr., 401.

⁷ *Ex parte Bollman*, 4 Cranch, 75; Cond. R., 33.

⁸ 2 Bish. Cr. L., § 1231; 2 Whart. Cr. L., § 2768; *Foster*, 210; 1 Hale, 131, 133, 149; *U. S. v. Hoxie*, 1 Paine C. C. R., 265; *U. S. v. Hanway*, 2 Wallace, Jr., 139; *Reg. v. Frost*, 9 Car. & P., 129; *Rex v. Lord Gordon Doug.*, 590; 4 Tucker's Black. App., 21; *People v. Fries*, Wheeler St. Tr., 666.

⁹ 23 Law R., 705, 707.

§ 318. **Who Guilty of Treason.** — When war has been levied, all those who voluntarily perform any part, however minute, or however remote from the scene of action, and who are actually leagued in the general conspiracy, are traitors.¹ Then enlisting or procuring any person to be enlisted in the service of the enemy is an act of treason,² and all persons assembling and marching with those traitorously assembled are guilty of treason, whether they are aware of the purposes of the assembly or aid and assist in acts of violence or not,³ unless compelled to join and continue with them from a well-grounded fear of present death.⁴

§ 319. **Adhering to the Enemies of the Government.** — A person may be guilty of adhering to the enemies of the state by giving them intelligence or sending them provisions or selling them arms or treacherously surrendering a fortress to them, or the like,⁵ or by encouraging them to aid such enemies in any way. And it is immaterial whether such acts are induced by sympathy with the purpose of the enemies or a desire for gain,⁶ or whether the enemies of the state are citizens of the state at open war with it or foreign pirates or robbers, acting under the authority of no particular nation, but who invade our state without any open hostilities between their nation and our state.⁷ But the offense of adhering and giving aid and comfort to the public enemies of the United States is not treason against the people of the state of Illinois.⁸

¹ *Ex parte Bollman*, 4 Cranch, 75; 2 Cond. R., 33; *Com. v. Knapp*, 9 Pick., 496; 2 Burr's Tr., 401; *U. S. v. Burr*, 4 Cranch, 470; *U. S. v. Pryor*, 3 Wash. C. C., 234.

² *Resp. v. McCarthy*, 2 Dall., 86; *Rex v. Harding*, 2 Vent., 315.

³ *Rex v. The Earls of Essex*, Moore, 621.

⁴ 1 East P. C., 70; *Rex v. Gordon*, 1 East P. C., 71; *Respublica v. McCarthy*, 2 Dall., 86; *R. v. McCrowther*, Foster, 1; 5 Car. & P., 316; *U. S. v. Hodges*, 2 Dall., 87; 2 Wheeler C. C., 477.

⁵ 2 Arch. C. P. & Pl., 892; 4 Black. Com., 83; 2 Chitty Cr. L., 63; 2 Whart. Cr. L., § 2737; 3 Greenl. Ev., § 244.

⁶ 2 Bish. Cr. L., § 1234; 23 Law R., 597, 601; *U. S. v. Pryor*, 3 Wash. C. C., 234.

⁷ 4 Black. Com., 83; 2 Chitty Cr. L., 63.

⁸ *People v. Lynch*, 11 John., 611.

§ 320. **Time — Place — Proof that the Persons Adhered to were Enemies — Number of Witnesses.** — If the prisoner is charged with an offense committed in this state, one good overt act must be proved to have been committed in the county where the venue is laid, then other overt acts of the same species of treason in other counties, whether charged in the complaint or not, may be proved if they amount to direct proof of the overt act charged,¹ or to show the intention of the defendant.² After proving a conspiracy and connecting the defendant with it, then the acts and declarations of the conspirators in the furtherance of the common design are admissible in evidence.³ Time need not be proved as alleged, provided that it be shown to be within three years, so that the offense is not outlawed.⁴ Public notoriety may be sufficient evidence of the fact that the persons to whom the defendant adhered were enemies of the state, but where war is only recently proclaimed, the gazette containing the proclamation may be given in evidence.⁵ Although a person can only be convicted of treason by a voluntary confession in open court, or by two or more competent witnesses,⁶ yet he may be held to bail or indicted upon the evidence of one.⁷

¹ Barb. Cr. L., 24; 2 Arch. C. P. & Pl., 888.

² *Respublica v. Maline*, 1 Dall., 33.

³ 1 East P. C., 70, 98.

⁴ R. S., 398, § 315.

⁵ Barb. Cr. L., 25; Foster, 219, 1 Hale, 164.

⁶ R. S., 392, § 263.

⁷ 2 Arch. C. P. & Pl., 889; 1 Burr's Tr., 196.

SECTION II.

HOMICIDE.

§ 321. Provisions of the Statuet Relating to Murder.

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323. Continued—Time of Death.

324. Evidence Required—1. Of the Killing.

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1. MURDER.

§ 321. Provisions of the Statute. — “Murder is the unlawful killing of a human being, in the peace of the people, with malice aforethought, either express or implied. The unlawful killing may be perpetrated by poisoning, striking, starving, drowning, stabbing, shooting, or any other of the various forms or means by which human nature may be overcome, and death thereby occasioned. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied when no considerable provocation appears, or when all of the circumstances of the killing show an abandoned and malignant heart.”¹

§ 322. Continued — Punishment. — “Whoever is guilty of murder, shall suffer the punishment of death, or imprison-

¹ R. S., 374, § 140.

ment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict. Upon a plea of guilty, the punishment shall be fixed by the court.”¹

§ 323. *Continued — Time of Death.* — “In order to make the killing either murder or manslaughter, it is requisite that the party die within a year and a day after the stroke received or the cause of death administered, in the computation of which the whole of the day on which the hurt was done shall be reckoned the first.”²

STATEMENT OF THE OFFENSE OF MURDER.³

(*Commence as in form on page 35*) that C. D.,⁴ on, etc., at, etc., in the said county, did unlawfully,⁵ feloniously⁶ and willfully, with malice afore-

¹ R. S., 374, § 142.

² *Id.*, § 147.

³ For form of an indictment for murder, by inoculating with the virus of small-pox, see *Fairlee v. People*, 11 Ills., 1; for another form for murder by striking, see *Jackson v. People*, 18 Ills., 269; *State v. McCormick*, 27 Iowa, 403; *State v. Watkins*, 27 Iowa, 415; *State v. Boyle*, 28 Iowa, 522.

⁴ It is not necessary to insert the words “with force and arms.” R. S., 408, § 411; 3 Chitty Cr. L., 733; 7 T. R.; 1 Keb, 652; 2 Hawks P. C. C., 25, § 90; 1 Bish. Cr. P., § 502; or “not having the fear of God before his eyes,” or “being moved and seduced by the instigation of the devil.” 1 Chitty Cr. L., 239, 240; 1 Bish. Cr. P., § 501.

⁵ Possibly not necessary. *Perry v. People*, 14 Ills., 497; 1 Chitty Cr. L., 241; *Rex v. Young*, 1 Russ., 391; *Jerry v. State*, 1 Blackf., 396; *State v. Bray*, 1 Mo., 180; *Curtis v. People*, 1 Breese, 197, 2d Ed., 256; *Fairlee v. People*, 11 Ills., 1; but it is advisable to insert it in an indictment, *Curtis v. People*, Breese, 199, 2d Ed., 256; 1 Scam., 285; and it is used in the statute, R. S., 374, § 140.

⁶ At common law the word “feloniously” was necessary. 2 Hale P. C., 184, 185; 3 Hale P. C., 187; 1 Arch. C. P. & Pl., 301; *Rex v. Dearing*, Cro. Eliz., 193; *Fairlee v. People*, 11 Ills., 1; *Curtis v. People*, 1 Breese, 199, 2d Ed., 256; 1 Scam., 288; *Jackson v. People*, 18 Ills., 269; *Jane v. State*, 3 Mo., 6; *State v. Murdock*, 9 Mo., 730; *State v. Gilbert*, 24 Mo., 380; *Williams v. State*, 8 Humph., 585.

thought,¹ assault² and then and there unlawfully, feloniously³ and willfully with malice aforethought did strike⁴ one Flora Temple,⁵ a human being,⁶ in

¹ The word "willfully" is usually inserted in compliants, Barb. Cr. L., 521; Haines T., 276-7, and in indictments, 1 Arch. C. P. & Pl., 881; 3 Chitty Cr. L., 750; 2 Bish. Cr. P., § 541; Jackson v. People, 18 Ills., 261; Lake v. People, 1 Park. Cr. R., 496. If, however, the word "feloniously" is inserted, it is said to be unnecessary to use the word "willfully," Rex. v. Haydon, 4 Co., 41a, but advisable to insert it, 2 Bish. Cr. P., §§ 543, 546. The omission of the words "with malice aforethought" will make the offense manslaughter instead of murder. 3 Chitty Cr. L., 750, n. p.; 1 Arch. C. P. & Pl. 301; State v. Nealy, 20 Iowa, 108; Sarah v. State, 27 Missis., 263; Com. v. Gibson, 2 Va. C., 70; State v. Duvall, 26 Wis., 415; Fouts v. State, 4 Greene Iowa, 500; but see Anderson v. State, 5 Pike, 445.

² Where the killing is charged to have been from a battery, it is said to be necessary in an indictment to aver an assault. 1 Arch. C. P. & Pl., 885; Lester v. State, 9 Mo., 666. Yet in one case, where the killing was by shooting, it was held that the word "assault" was not absolutely essential. 2 Bish. Cr. P., § 513; Reed v. State, 8 Ind., 200.

³ The allegations "feloniously," etc., apply to the stroke as well as to the assault, and it is not necessary to repeat them before the word "strike." 1 Bish. Cr. P., § 574; Rex. v. Nicholson, 1 East P. C., 346; State v. Owen, 3 Murph., 7; State v. Rabon, 4 Rich., 260; Maile v. Com., 9 Leigh, 661; Heydon's Case, 4 Co., 41a; *contra*, Resp. v. Honeyman, 2 Dall., 228; State v. Watkins, 27 Iowa, 415; State v. McCormick, 27 Iowa, 403; State v. Knouse, 29 Iowa, 118, State v. Thompson, 31 Iowa, 393; and see Fairlee v. People, 11 Ills., 1.

⁴ Where the death arises from any wounding by beating, or bruising, it is said that the word "struck" or "strike" is essential. 1 Chitty Cr. L., 243; 2 Bish. Cr. P., § 516; Long's Case, 5 Co., 120a, 122b, 123a; State v. Owen, 1 Murph., 452; but where the blow was made with a dirk, the words "stab," "stick," and "thrust," Gibson v. Com., 2 Va. C., 111; or where the killing was by shooting, the words "did shoot off and discharge," State v. Freeman, 1 Speirs, 57, are equivalent to the word "strike," and sufficient.

⁵ The Christian and surname of the person killed must be correctly stated if known. 2 Hawk P. C. C., 23, § 78; 2 Bish. Cr. P., 506; Davis v. People, 19 Ills., 74; Vandermark v. People, 47 Ills., 122; State v. Dudley, 7 Wis., 664; State v. Lincoln, 17 Wis., 581; State v. Kube, 20 Wis., 217; State v. Kroscher, 24 Wis., 64; *contra*, State v. Emigh, 18 Iowa, 123; or alleged to be unknown, or that the deceased "was not named," "not baptised," will not do, 2 Bish. Cr. P., §§ 506-511. But if described by the initials of his Christian name and he was as well known by his initials as his full name, it is sufficient. Vandermark v. People, 47 Ills., 122. It is sufficient to describe the deceased by the name by which he is commonly known. People v. Freeland, 6 Cal., 96; State v. Angel, 7 Ired., 27. An error in the middle letter of the name has been held to be immaterial. People v. Lockwood, 6 Cal., 205; Miller v. People, 39 Ills., 458; Moore's Civil Justice, 436 n. 3; and see Humphrey v. Phillips, 57 Ills., 135; Erskine v. Davis, 25 Ills., 251.

⁶ None of the precedents contain the allegation that the person killed was

the peace of the people, then and there being¹ with a certain stick,² then and there held in his right hand, and did thereby then³ and there give her a mortal⁴ wound on the back side of her head, of which said mortal wound⁵ the said Flora Temple then and there instantly died (or "*languished a short time, and then, on the — day of —, A. D., 18 —, and there*

a human being, though the words are used in the statute defining the offense. In Iowa it has been held that such allegation is unnecessary. *State v. Stanley*, 33 Iowa, 530.

¹ Under our statute it should be alleged that the deceased was in the peace of the people. *R. S.*, 374, § 140; though at common law it was unnecessary, 3 Chitty Cr. L., 750, n. n; *Heydon's Case*,⁴ 4 Co., 40a; *Com. v. Murphy*, 11 Cush., 472.

² The length and thickness of the stick is sometimes stated. *Jackson v. People*, 18 Ills., 270; but it is not necessary or usually done. 3 Chitty Cr. L., 763. In an indictment it has been considered necessary, if the death was occasioned by an instrument in the hand of the party, to so allege, 1 Bish. Cr. P., § 515; 1 Arch. C. P. & Pl., 886, and to state the kind of instrument, and whether it was held in the right or left hand or in both, *Id.*, Barb. Cr. L., 531. The words "in both hands" are sufficient without inserting the word "his" between the words "both" and "hands." *Ward v. State*, 8 Blackf., 101. It is not necessary to state the value of the instrument used. 1 Arch. C. P. & Pl., 886; 2 Bish. Cr. P., § 505.

³ The allegation of time and place "then and there" should be repeated to every material fact issuable and triable; 1 Chitty Cr. L., 198; *Id.*, 218, 220; unless the fact stated necessarily refers to the time and place previously mentioned. *Jackson v. People*, 18 Ills., 270; *Com. v. Baker*, 12 Cush., 186.

⁴ In an indictment it must be alleged that the wound was mortal; 2 Bish. Cr. P., § 521; 1 Hale P. C., 186; *State v. Conley*, 39 Me., 78; *Rex v. Ladd*, 1 Leach, 96; and it has been held that the length and depth of the wound must be averred, so that it may appear that it was mortal; 1 Arch. C. P. & Pl., 887; *State v. Owen*, 1 Murph., 453; but this doctrine has been overruled; *Id.*; *State v. Moses*, 2 Dev., 453; *State v. Crank*, 2 Bailey, 66; *Lazier v. Com.*, 10 Grat., 708; *Dias v. State*, 7 Blackf., 20; *Com. v. Woodward*, 102 Mass., 155; *People v. Stevenson*, 9 Cal., 273; or at least it can only be urged on motion to quash the indictment, if at all; *R. S.*, 408, § 411; *Stone v. People*, 2 Scam., 338.

⁵ It must be alleged that the deceased died on account of the injuries inflicted. *Fairlee v. People*, 11 Ills., 1; *Jackson v. People*, 18 Ills., 269. But it is sufficient to allege that he died of the wound, and it need not be added that he died by the stroke. *State v. Conley*, 39 Me., 78; *State v. Wimberley*, 3 McCord, 190; *People v. Loyd*, 9 Cal., 54.

died¹): and so the said A. B., on his oath says that the said C. D.,² in manner and by means aforesaid, unlawfully, feloniously, and willfully, with malice aforethought, did willfully kill and murder³ the said Flora⁴ Temple⁵ (conclude as in form on page 35).

STATEMENT OF THE OFFENSE OF MURDER (WITH A KNIFE⁶).

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, did unlawfully, feloniously and of his malice aforethought, with a knife then and there held in his right hand, assault and stab one G. H., a human being, in the peace of the people then and there being, and gave him several mortal wounds,⁷ of which said mortal wounds the said G. H.

¹ The time of both the stroke and death must be stated, that the death may appear to have taken place within a year and a day after the mortal injury, R. S., 374, § 147; 2 Hale P. C., 179; People v. Wallace, 9 Cal., 30; People v. Cox, 9 Cal., 32. And it has been said that where the killing is by a battery it is not sufficient to allege that "he instantly did die;" Whart. Cr. L., § 1065; *contra*, State v. Stanley, 33 Iowa, 530; but these words are used substantially in many of the approved precedents; 3 Chitty Cr. L., 752; 2 Bish. Cr. P., § 551; and we cannot see why they are not sufficient.

² It is said to be better to omit the averment of time and place in the conclusion where the stroke was on one day and the death on another; 2 Bish. Cr. P., §§ 549, 550; but in such case the insertion of the words, "then and there" has been held not to make the time uncertain; State v. Huggins, 12 Rich., 402; Woodsides v. State, 2 How. Missis., 655.

³ The word "murder" was formerly said to be essential because used in the English statute defining the offense; 2 Bish. Cr. P., § 548; 1 Arch. C. P. & Pl., 391; 3 Chitty Cr. L., 750, n. u; Dias v. State, 7 Blackf., 20; and it would be safer to insert the word "murder" in the conclusion of an indictment, though since it is not used in our statute as in the English, it seems to be unnecessary. In another state, where the statute is like ours, it was held not to be necessary; Anderson v. State, 5 Pike Ark., 444.

⁴ The omission of the name of the person killed in the conclusion has been held to vitiate the indictment. State v. Pemberton, 30 Mo., 376; Dias v. State, 7 Blackf., 20; but see State v. Moses, 2 Dev., 453.

⁵ It is not necessary to conclude "against the statute." 2 Bish. Cr. P., §§ 499, 548.

⁶ For form of an indictment for murder by shooting held good, State v. Stanley, 33 Iowa, 527.

⁷ While in an indictment it is considered necessary to state in what part of the body the wound was given, Jackson v. People, 18 Ills., 270; Dias v. State, 7 Blackf., 20, yet in a complaint this is not usually inserted, Barb. Cr. L., 665; Haines T., 377; and it has been held that an indictment which charged the wound to have been inflicted in and upon the body of the deceased was sufficient. Sanchez v. People, 24 N. Y., 147; 4 Park. Cr. R., 535; see State v. Green, 7 Ired., 39.

languished a short time, and then, on the — day of —, A. D. 18—, and there died (*or then and there instantly did die*); and so the said A. B. on his oath says that the said C. D., in manner and by means aforesaid, unlawfully, feloniously and willfully, with malice aforethought, did kill and murder the said G. H. (*conclude us in form on page 35*).

STATEMENT OF THE OFFENSE OF MURDER BY POISON.¹

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, did unlawfully, feloniously, willfully, and of his malice aforethought, a large quantity of deadly poison called white arsenic,² *to wit.*, the quantity of two drachms of the said white arsenic, did put, mix and mingle into and with a certain quantity of beer which one G. H. was then and there about to drink (the said C. D. then and there well knowing that he, the said G. H., intended and was then and there about to drink the said beer, and the said C. D. then and there also well knowing the said white arsenic, as aforesaid by him put, mixed and mingled into and with the said beer, to be a deadly poison); and that the said G. H. afterwards, *to wit.*, on the day and year aforesaid, at the town aforesaid, in the county aforesaid, did take, drink and swallow down a large quantity, *to wit.*, half a pint of the said beer, with which the said white arsenic was so mixed and mingled by the said C. D. as aforesaid (he the said G. H., at the time he so took, drank and swallowed down the said beer, not knowing there was any white arsenic or any other poisonous or hurtful ingredient mixed or mingled with the said beer); by means whereof he the said G. H. then and there became mortally sick and distempered in his body; and the said G. H. of the poison aforesaid, so by him taken, drank and swallowed down as aforesaid, and of the said mortal sickness and distemper³ occasioned thereby, from the said — day of —, in the year last aforesaid, until the — day of —, A. D. 18—, in the county aforesaid, did languish, and languishing did live on which said — day of —, A. D. 18—, at the town aforesaid in the county aforesaid of the said mortal sickness occasioned by the said poison as aforesaid died; and so the said A. B. on his oath says that the said C. D., in manner and form aforesaid, unlawfully, feloniously, willfully and of his malice aforethought, did kill and murder the said G. H. against

¹ For form of allegation of malice held sufficient, *State v. Duvall*, 26 Wis., 415.

² It has been held that the kind of poison need not be stated or proved. *Carter v. State*, 2 Ind., 617; yet, according to some of the authorities, it is necessary to state the kind of poison used, but not necessary to prove such allegation; 2 Bish. Cr. P., § 555; proof that the deceased was poisoned by any other kind of poison being sufficient to warrant a conviction; 2 Hale P. C., 185; *Rex v. Pigeonry*, 7 Mod., 149.

³ The words "of which said mortal sickness and distemper" were held sufficient. *Reg. v. Sandys*, 2 Moody, 227; *C. & M.*, 345.

the peace and dignity of the people of the state of Illinois (*conclude as in form on page 35*).

EVIDENCE REQUIRED.

§ 324. 1. **It Must be Proved that the Person alleged to have been Murdered has been Killed.**¹—It is said to be a good general rule never to convict a man for murder or manslaughter unless the fact was proved to have been done, or at least the body found dead, because instances have arisen of persons being executed for murdering others who have afterwards been found alive.² There are, however, numerous authorities sustained by the better reason for saying that when the dead body has not been found, the fact that the person has been killed may be proved by circumstantial evidence, when the facts and circumstances are so strong as to render it morally certain and leave no reasonable doubt of such fact, and the actual proof of the finding and identifying is not absolutely essential;³ as where the deceased was thrown overboard into the sea and was never heard of afterwards,⁴ or where the body was entirely burned up so that it could not be identified.⁵ But it has been held, after an examination of all the authorities, by the Court of Appeals in N. Y., that a person cannot be convicted of murder or manslaughter unless the dead body has been found and identified or there is direct evidence of the killing by those who saw it.⁶

§ 325. **Continued — The Death must have been Caused by the Injury.**—It sometimes becomes a difficult question to determine whether the deceased was killed by the injury received from

¹ State v. Vincent, 24 Iowa, 570.

² Hale, 290.

³ 3 Greenl. Ev., § 30; 1 Arch. C. P. & Pl., 833; Whart. Am. Cr. L. of Hom., 316; Burr Circ. Ev., 678–680; U. S. v. Johns, 1 Wash. C. C., 372; State v. Frier, 1 Wright O., 20; U. S. v. Gilbert, 2 Sumn. C. C., 27; Com. v. Webster, 5 Cush., 296; People v. Ruloff, 3 Park. Cr. R., 454; People v. Wilson, 3 Park. Cr. R., 199; Stocking v. State, 7 Ired., 326.

⁴ Hindmarsh's Case, 2 Leach, 571; People v. Wilson, 3 Park., 199.

⁵ Com. v. Webster, 5 Cush., 295.

⁶ Ruloff v. People, 18 N. Y., 179; see also holding same doctrine, Reg. v. Hopkins, 8 Car. & P. 591; Roscoe Cr. Ev., 13; 4 Blackf., 358.

the accused, by his own act or neglect, or by the improper treatment of his physician. If the injury caused the death, it is sufficient to warrant the conviction of the person who did the injury of murder though the person injured might have recovered had he used proper care himself,¹ or submitted to a surgical operation to which he refused submission,² or had the surgeons treated the injury properly.³ So if the person would have died from some other cause already operating, yet if the injury hastened the termination of life, this is enough.⁴ But where the wound was not of itself mortal, and the party died in consequence, solely of the improper treatment, not at all of the injury, the person doing the injury cannot be convicted of murder.⁵ Yet where both the injury and improper treatment jointly caused the death, the person doing the injury may be convicted of a felonious homicide.⁶

§ 326. **The Means Used to Kill.**—It is immaterial as respects the responsibility for the killing by what sort of force death is produced; as whether it proceeds from the action of the mind or body,⁷ or by working upon the fears of another whereby he is put into such a passion of grief or fear that the party either dies suddenly or contracts some disease whereof he dies;⁸ whether it operates solely or concurrently with other things;⁹ whether it was consented to by the person on whom

¹ *Rex v. Rew*, J. Kel, 26; 1 Hawk P. C., 93; *McAllister v. State*, 17 Ala., 434; *Com. v. Green*, Ashm., 289; *Com. v. McPike*, 3 Cush., 181.

² *Reg. v. Holland*, 2 Moody & Ry., 351; *Reg. v. West*, 2 Car. & K., 784.

³ *State v. Baker*, 1 Jones N. C., 267; *Com. v. Hackett*, 2 Allen, 136; *Reg. v. Haines*, 2 Car. & K., 368.

⁴ 1 Hale P. C., 429; 2 Bish. Cr. L., § 638; *State v. Morea*, 2 Ala., 275; *Rex v. Martin*, 5 Car. & P., 130; *Rex v. Webb*, 1 M. & Rob., 405.

⁵ 3 Greenl. Ev., § 139; 1 Hale P. C., 428; *Reg. v. Conner*, 2 Car. & K., 518; *Parsons v. State*, 21 Ala., 300; *State v. Scates*, 5 Jones N. C., 420, 423.

⁶ *Com. v. Hackett*, 2 Allen, 136, 141; *State v. Morphy*, 33 Iowa, 276; *contra*, *State v. Scott*, 12 La. An., 274.

⁷ *Reg. v. Pitts*, C. & M., 284; 1 East P. C., 225; 3 Greenl. Ev., § 142.

⁸ 1 Bish. Cr. L., § 562; *Reg. v. Pitts*, C. & M., 284; *Rex v. Evans*, 1 Russ. on Crimes, 489; *U. S. v. Freeman*, 4 Mason, 505; *contra*, 1 Hale, 427, 429; 1 East P. C., 225; Barb. Cr. L., 31.

⁹ *Rex v. Russel*, 1 Moody, 356; *Ross v. Com.*, 2 B. Monr., 417; *Reg. v. Haines*, 2 Car. & K., 368; *McAllister v. State*, 17 Ala., 434; *Rex v. Rew*, J.

it operated or not;¹ whether it was a blow² or a drug³ or an instrument or other thing used to procure an abortion,⁴ or a command addressed to an inferior under obligation to obey,⁵ or an unlawful confinement,⁶ or a leaving of a dependent person in a place of exposure,⁷ or any omission of duty which the law enjoins,⁸ or a ball discharged from a gun;⁹ whether it was accompanied by acts of other persons concurring in what was done or operated alone,¹⁰ or was of any other nature.¹¹

§ 327. **The Killing May be Without Violence — Neglect.** — It is not necessary that the death should be caused by actual violence, for if a man does an act the probable consequence of which may be and eventually is death, such killing may be murder, although no stroke be struck by himself, and no killing have been primarily intended;¹² as where a person carried his sick father, against his will, in a severe season from one town to another, by reason whereof he died;¹³ or where a harlot left her child in an orchard covered only with leaves, in which condition it was killed by a kite;¹⁴ or where a child was

Kel, 26; Reg. v. Holland, 2 Moody & Ry., 351; Reg. v. West, 2 Car. & K., 784.

¹ Com. v. Parker, 9 Met., 263, 265; Rex v. Hughes, 5 Car. & P., 126; Reg. v. Alison, 8 Car. & P., 418; Rex v. Russel, 1 Moody, 356.

² Shorter v. People, 2 Com., 193; Gray's Case, J. Kel, 64, 133; Keat's Case, Skin, 666.

³ Rex v. Martin, 3 Car. & P., 211; Ann v. State, 11 Humph., 159.

⁴ Com. v. Keeper, 2 Ashm., 227; Reg. v. West, 2 Car. & K., 784; Com. v. Parker, 9 Met., 263.

⁵ U. S. v. Freeman, 4 Mason, 505.

⁶ Reg. v. Marriott, 8 Car. & P., 420.

⁷ Beal's Case, 1 Leon, 327.

⁸ Rex v. Squire, 1 Russ. on Crimes, 490; Rex v. Saunders, 7 Car. & P., 277; Reg. v. Shepherd, Leigh & C., 147; Reg. v. Dant, Leigh & C., 567; Reg. v. Smith Leigh & C., 607; Reg. v. Renshaw, 20 Eng. L. & Eq., 593.

⁹ State v. Sisson, 3 Brev., 58.

¹⁰ People v. Mather, 4 Wen., 229; Reg. v. Haines, 2 Car. & K., 368; Reg. v. Mazeau, 9 Car. & P., 676.

¹¹ Chichester's Case, Aleyn, 12.

¹² 4 Black. Com., 197; Com. v. Webster, 5 Cush., 295.

¹³ 1 Hawk P. C. C., 3, § 5; 1 Hale, 431, 432.

¹⁴ 1 East P. C., 226; 1 Hale, 431; Reg. v. Plummer, 1 Car. & K., 600.

placed in a hogsty where it was destroyed;¹ or where a parish officer shifted a child from parish to parish until it died from want of care and sustenance;² or forcing a person to do an act which is likely to produce his death and which does produce it;³ or where death comes by reason of an omission to discharge a legal duty;⁴ or where death ensues from gross or willful neglect and carelessness of a medical man.⁵ In these cases it was considered that the acts so done were with malice prepenence.⁶

§ 328. **Proof that the Killing was Substantially in the Manner Alleged is Sufficient.**—It will be sufficient if the manner of the death proved agree in substance with that charged.⁷ Therefore, evidence that the deceased was killed with a different weapon from that described is admissible⁸ if the instrument was capable of producing the same kind of death;⁹ as if a wound or bruise be alleged to have been given with a sword, proof may be received that it was given with a staff or axe;¹⁰ or if a wound or bruise is alleged to have been given with a wooden staff, it may be proved to have been given with a stone.¹¹ But proof that the murder was committed by striking with a gun on the head does not sustain the charge

¹ 1 East P. C., 226; Reg. v. Crumpton, C. & M., 597; Rex v. Self, 1 Leach, 137; Ann v. State, 11 Humph., 159.

² Palmer, 545.

³ Russ. Cr. L., 425; U. S. v. Freeman, 4 Mason, 505; Reg. v. Pitts, C. & M., 284.

⁴ Reg. v. Hughes, Dears & B., 248; 7 Cox C. C., 301; Reg. v. Lowe, 3 Car. & K., 123; Reg. v. Haines, 2 Car., 368.

⁵ Rex v. Long, 4 Car. & P., 398; Rex v. Van Butchell, 3 Car. & P., 635; Rex v. Williamson, 3 Car. & P., 635.

⁶ 1 Hale P. C., 427, 429, 1 East P. C., 225; Barb. Cr. L., 30; 2 Bish. Cr. L., § 635.

⁷ 2 Bish. Cr. P., § 514; Roscoe Cr. Ev., 706; Barb. Cr. L., 53; 1 Arch. C. P. & Pl., 885; Dukes v. State, 11 Ind., 557; Reg. v. Warman, 1 Den. C. C., 183.

⁸ 1 Arch. C. P. & Pl., 884; People v. Colt, 3 Hill, 432; Com. v. McAfee, 108 Mass., 458.

⁹ Barb. Cr. L., 53; Mackallay's Case, 9 Co., 67.

¹⁰ State v. Fox, 1 Dutcher, 556; State v. Smith, 32 Me., 369.

¹¹ Rex v. Sharwin, 1 East P. C., 341.

of shooting from a gun by means of powder and shot.¹ Where the killing is charged to have been by one description of poison, the charge may be supported by proof of another description of poison.² But if a person be charged with one species of killing, as by poison, he cannot be convicted of a species of death entirely different.³ The charge of exposure as the cause of death is not supported by proof of acceleration merely.⁴ So if the indictment charges that the death was occasioned by two jointly co-operating causes, as by starving and beating, both must be proved or the indictment fails.⁵

§ 329. 2. It must Appear that the Deceased was a Human Being. — A child in its mother's womb is not a human being within the meaning of the statute. The rule is that it must be born.⁶ Every part of it must come from the mother before the killing of it will constitute a felonious homicide.⁷ The umbilical cord which attaches it to her need not be parted,⁸ neither need the child have breathed, if it otherwise had life and independent circulation;⁹ while, on the other hand, suppose it to have breathed before being fully born, and then death to have ensued by unnatural means before the delivery was complete, it could not be the subject of this offense.¹⁰ Therefore where a woman sunders the head from her infant's body

¹ *People v. Guedell*, 43 Ills., 226.

² 3 Greenl. Ev., § 135; *Carter v. State*, 2 Carter Ind., 617; *Rex v. Pigeonry*, 7 Mod., 149; 2 Hale P. C., 115; 2 Hawk P. C. C., 23, § 84.

³ 1 Arch. C. P. & Pl., 885; *Rex v. Briggs*, 1 Moody, 318; *Rex v. Thompson*, 1 Moody, 139; *Rex v. Kelley*, 1 Moody, 113; *Rex v. Hughes*, 5 Car. & P., 126; *Rex v. Tyre*, Russ. & Ry., 345.

⁴ *Stockdale's Case*, 2 Lewin C. C., 220; Barb. Cr. L., 55; 3 Greenl. Ev., § 141.

⁵ *Stockdale's Case*, 2 Lewin C. C., 220; *Rex v. Saunders*, 7 Car. & P., 277.

⁶ *Rex v. Brain*, 6 Car. & P., 349; *Abrahams v. Foshee*, 3 Iowa, 274.

⁷ *Rex v. Brain*, 6 Car. & P., 349; *Rex v. Crutchley*, 7 Car. & P., 814; *Rex v. Sellis*, 7 Car. & P., 850; *Rex v. Poulton*, 5 Car. & P., 329.

⁸ *Rex v. Reeves*, 9 Car. & P., 25; *Rex v. Trilloe, C. & M.*, 650; 2 Moody, 260; *Rex v. Crutchley*, 7 Car. & P., 814.

⁹ *Rex v. Brain*, 6 Car. & P., 349.

¹⁰ *Rex v. Sellis*, 7 Car. & P., 850; *Rex v. Enoch*, 5 Car. & P., 539; *Reg. v. Poulton*, 5 Car. & P., 329.

before the birth is complete, or otherwise kills the child, she is not guilty of murder.¹ If, however, a child receives an injury while it is yet unborn, and it is afterwards born alive and then dies, the person doing the injury is guilty of murder.² So if a person intending to procure an abortion does an act which causes the child to be born alive before the natural time, and consequently less capable of living, whereby it dies after birth from this premature exposure to the external world, he is guilty of murder;³ and if one counsels before birth a mother to kill her infant after birth, and she does it, he becomes thereby an accessory before the fact to her act of murder.⁴

§ 330. 3. The Deceased must have been "in the Peace of the People," by which is meant in the enjoyment of the right of existence at the particular time and place when and where he was killed.⁵ Therefore it is not murder for a sheriff to hang a man in pursuance of a judgment and sentence of a court having jurisdiction,⁶ but if a person be condemned to be hanged, and the sheriff behead him, this is murder.⁷ So it is not murder to take the life of any enemy in the actual heat of battle in time of war,⁸ for the person killed had not at that moment and in that place a right to his life if the other could take it away. If one maliciously kills an alien enemy not in the exercise of war,⁹ or if a person not authorized executes the sentence of death,¹⁰ it is murder. A person forfeits

¹ Reg. v. West, 2 Car. & K., 784; Rex v. Senior, 1 Moody, 346; Reg. v. Poulton, 5 Car. & P., 329; Rex v. Brain, 6 Car. & P., 349; Rex v. Pulley, 5 Car. & P., 539; Rex v. Wright, 9 Car. P., 754.

² 3 Inst., 50; 1 Hale P. C., 433; Reg. v. West, 2 Car. & K., 784; Rex v. Senior, 1 Moody, 346.

³ Reg. v. West, 2 Car. & K., 784; Rex v. Senior, 1 Moody, 346; 1 Roscoe Cr. Ev., 695; *contra*, 1 Hale P. C., 433; 5 Taunt., 21.

⁴ 1 Hale P. C., 433; 3 Inst., 51; R. S., 393, § 274.

⁵ 1 Hawk P. C., 94, § 15; 1 Hale P. C., 43; 2 Bish. Cr. L., § 630; Rex v. Depardo, 1 Taunt., 26; Russ & Ry., 134; Rex v. Helsham, 4 Car. & P., 394.

⁶ R. S., 375, § 151.

⁷ 1 Hale P. C., 433.

⁸ Id.

⁹ State v. Grit, 13 Minn., 341.

¹⁰ 1 Hawk P. C., 80, § 9.

his right of existence by attacking another, making it necessary to kill him in self-defense,¹ or by attempting to commit a felony, making it necessary to kill him to prevent the commission of the offense.² The law protects every person,³ even the greatest criminal, and no man has a right to take his life, except by its authority and in the manner prescribed by its provisions.⁴ If an alien comes here, even in time of war, it is murder to kill him except in actual heat and exercise of war.⁵ If he submits and lays down his arms, his life must be spared.⁶

§ 331. **It must be Proved that the Prisoner Killed the Deceased — Confessions.** — If the dead body has been found under circumstances showing that the deceased was killed, then it may be shown that the deceased was killed by the prisoner by circumstantial evidence,⁷ which ought not only to be consistent with the prisoner's guilt, but inconsistent with any other rational conclusion.⁸ Confessions are competent evidence in a case, but alone are not sufficient to convict a man of murder unless sustained by the facts and circumstances.⁹ If, however, the confessions are made by a prisoner under the influence of promises, or are extorted by violence or threats,

¹ *Young v. State*, 11 Humph., 200; *People v. Shorter*, 4 Barb., 460; *Shorter v. People*, 2 Com. N. Y., 193; *Campbell v. People*, 16 Ills., 17; *People v. Cole* 4 Park. Cr. R., 35; but see *Greschia v. People*, 53 Ills., 295; *State v. Harris*, 1 Jones N. C., 190.

² 1 Hale P. C., 481, 547; *Oliver v. State*, 17 Ala., 587; *U. S. v. Rutherford*, 3 Wash. C. C., 515; *People v. Payne*, 8 Cal., 341; *State v. Roane*, 2 Dev., 58; *Rapp v. Com.*, 14 B. Monr., 614.

³ *State v. Jones*, Walker Missis., 83.

⁴ 3 Inst., 50; 2 Bish. Cr. L., §§ 630, 631; *Penn v. Robertson*, Addison, 246.

⁵ 4 Black. Com., 198, 1 East P. C., 227.

⁶ Vattel Law of Nations, b 3, § 146; 1 Bish. Cr. L., 134.

⁷ *Ruloff v. People*, 18 N. Y., 179; *Gates v. People*, 14 Ills., 434.

⁸ *Hodge's Case*, Lewin C. C., 227; 3 Greenl. Ev., §§ 134, 137.

⁹ *Gates v. People*, 14 Ills., 437; *People v. Ruloff*, 3 Park. Cr. R., 401, 437; *People v. Porter*, 2 Park. Cr. R., 14; *Bergen v. People*, 17 Ills., 426; *Cunningham v. Com.*, 9 Bush. Ky., 149; *State v. Ostrander*, 18 Iowa, 454; *State v. Pratt*, 20 Iowa, 267; *State v. Wright*, 19 Iowa, 94; *State v. Rora-backer*, 19 Iowa, 755; *State v. Turner*, 19 Iowa, 144; *State v. Wilson*, 8 Iowa, 407; *State v. Henkle*, 6 Iowa, 380; *State v. Stanley*, 33 Iowa, 531.

they are not admissible in evidence.¹ But if facts are elicited by such confessions, they may be given in evidence.²

§ 332. **When Accused Liable for the Killing.** — It is not necessary that the killing should have been done by the prisoner's own hand. If he was actually present aiding and abetting the deed, or was constructively present by performing his part in an unlawful and felonious enterprise, expected to result in homicide, such as by keeping watch at a distance to prevent surprise, or the like, and murder is committed by some other of the party in pursuance of the original design,³ or if he combined with others to commit an unlawful act with the resolution to overcome all opposition by force, and it results in murder, though at the time of the act he is at such a distance as to be out of view,⁴ or if he employ another person unconscious of guilt, such as an idiot, lunatic or child of tender age as the instrument of his crime, he is guilty as the principal and immediate offender, and the charge against him as such will be supported by evidence of these facts;⁵ but mere presence is not sufficient to constitute a party a principal to a murder unless he aids, assists or abets.⁶

§ 333. **5. The Killing must be Shown to have been "with Malice Aforethought, either Express or Implied."**⁷ — The legal sense of the words "malice aforethought" is not confined to a particular animosity to the deceased, but extends to an evil de-

¹ *Gates v. People*, 14 Ills., 437; *Miller v. People*, 39 Ills., 457; *Austin v. People*, 51 Ills., 236; *Cropper v. U. S.*, *Morris Iowa*, 259.

² *Gates v. People*, 14 Ills., 437.

³ *Foster*, 259, 350, 353; *Rex v. Culkin*, 5 Car. & P., 121; *Brennan v. People*, 15 Ills., 511; *People v. Mather*, 4 Wen., 229; *Rex v. Lockett*, 7 Car. & P., 300; *Kennedy v. People*, 40 Ills., 488; *U. S. v. Ross*, 1 Gallis C. C. R., 524; *Com. v. Roberts*, 108 Mass., 296.

⁴ *U. S. v. Ross*, 1 Gallis C. C. R., 524; *Brennan v. People*, 15 Ills., 511; *Reg. v. Howell*, 9 Car. & P., 437; *State v. Simmons*, 6 Jones N. C., 21; *Com. v. Daley*, 4 Penn. Law J., 154; *Reg. v. Tyler*, 8 Car. & P., 616; *State v. Nash*, 7 Iowa, 350.

⁵ 3 Greenl. Ev., § 138; *Rex v. Palmer*, 1 N. R., 96; *Com. v. Hill*, 11 Mass., 136; *Com. v. Chapman*, 11 Cush., 422; *Rex v. Michael*, 9 Car. & P., 356.

⁶ *Connaughty v. State*, 1 Wis., 159; *State v. Farr*, 33 Iowa, 553.

⁷ *State v. Declotts*, 19 Iowa, 447; *State v. McCormick*, 27 Iowa, 402; *Shannahan v. Com.*, 8 Bush. Ky., 463; *Blemen v. Com.*, 7 Bush. Ky., 320.

sign in general, a wicked and corrupt motive, an intention to do evil, the result of which is fatal.¹ It is sufficient that the circumstances show cruelty and malignity carrying in them a plain indication of a depraved, wicked and malignant spirit.² The books generally define malice aforethought to be such a depraved condition of mind as shows a total disregard of social duty and a heart bent wholly on evil.³

§ 334. **Malice Express or Implied, Defined.** — “Express malice is that deliberate intention unlawfully to take away the life of a fellow creature which is manifested by external circumstances capable of proof;”⁴ such as by lying in wait, antecedent menaces, former grudges and concerted schemes to do the deceased bodily injury.⁵ Malice shall be implied when no considerable provocation appears or when all the circumstances of the killing show an abandoned and malignant heart;⁶ as where a person without any apparent provocation recklessly shoots another,⁷ or willfully poisons another, or kills another suddenly without provocation, for no person, unless he be of an abandoned heart would be guilty of such an act upon a slight or no apparent cause.⁸ In such cases the law will infer a general malice from such depraved inclination to mischief.⁹ As a sane man is a voluntary agent acting upon mo-

¹ Foster, 256; 4 Black. Com., 198; 1 East P. C., 215; *Vandermark v. People*, 47 Ills., 123.

² *State v. Turner*, Wright, 20; *U. S. v. Cornell*, 2 Mason, 60; *State v. Smith*, 2 Strob., 77; *Com. v. Drew*, 4 Mass., 391; *Anthony v. State*, 13 Sm. & M., 263.

³ 2 Bish. Cr. L., § 675; *State v. Jarrott*, 1 Ired., 76; *U. S. v. Cornell*, 2 Mason, 60; *State v. Smith*, 2 Strob., 77; *Beauchamp v. State*, 6 Blackf., 299; *People v. Divine*, 1 Edin. Sel. Cas., 594; *Reg. v. Tayler*, 8 Car. & P., 620; *State v. Sinmons*, 3 Ala., 497.

⁴ R. S., 374, § 140.

⁵ Hale, 451; 4 Black. Com., 199; 1 Arch. C. P. & Pl., 847.

⁶ R. S., 374, § 140; *Kennedy v. People*, 40 Ills., 488.

⁷ *Vandermark v. People*, 47 Ills., 123; *Perry v. People*, 14 Ills., 498.

⁸ 4 Black. Com., 200; *Barb. Cr. L.*, 26; 1 East P. C. C., 5, § 2; *Riley v. the State*, 9 Humph., 646; *State v. Tipsey*, 3 Dev., 485; *State v. Sisson*, 3 Brev., 58; *State v. Tilley*, 3 Ired., 424; *Mitchum v. State*, 11 Ga., 615.

⁹ 1 Hale, 474; 1 Hawk P. C. C., 29, § 12; 4 Black. Com., 200; 1 East P. C. C., 5, § 18; *Perry v. People*, 14 Ills., 498; *Vandermark v. People*, 47 Ills., 122.

tives, he must be presumed to contemplate and intend the necessary, natural and probable consequences of his own acts. If, therefore, one voluntarily or willfully does an act which has a direct tendency to destroy another's life, the natural and necessary conclusion from the act is that he intended so to destroy such person's life, and from such act the law will imply malice.¹

§ 335. **Malice, when Presumed.** — Malice is presumed from the fact of killing unaccompanied with circumstances of extenuation,² and it is incumbent upon the prisoner to prove such circumstances as will rebut this presumption,³ though the burden of proving malice is upon the people,⁴ and if they do not prove it beyond a reasonable doubt, the prisoner should be acquitted of the crime of murder, but may be convicted of manslaughter.⁵ In the absence of apparent well-founded danger of great bodily harm, or such provocation as is calculated to excite irresistible passion, the law will imply malice.⁶ So if a man assault another with intent to do him a bodily injury, and death ensue, malice sufficient to constitute murder will be presumed if the act be of such a nature as plainly and in

¹ *State v. Town*, Wright, 75; *Mitchell v. State*, 5 Yerg., 340; *State v. McFall*, Addis, 255; *People v. McLeod*, 1 Hill, 377; *State v. Turner*, Wright, 20; *McDaniels v. State*, 8 Sm. & M., 401; *State v. Tilley*, 3 Ired., 424; *Ann v. State*, 11 Humph., 159; *People v. Kirby*, 2 Park. Cr. R., 28; *Green v. State*, 28 Missis., 687; *State v. Johnson*, 3 Jones, 266; but see *U. S. v. Armstrong*, 2 Curtis, 446.

² *People v. March*, 6 Cal., 543; *State v. Knight*, 43 Me., 11; *Com. v. Kork*, 9 Met., 93; *Rex v. Greenacre*, 8 Car. & P., 35; *McDaniel v. State*, 8 Sm & M., 401; *State v. Dicklots*, 19 Iowa, 447; *Com. v. Hawkins*, 3 Gray, 463; *Murphy v. People*, 37 Ills., 448; *Peri v. People*, 65 Ills., 18; *contra*, *Goodall v. State*, 1 Oregon, 333; *State v. Gillick*, 7 Iowa, 288; *State v. McCormick*, 27 Iowa, 402.

³ *R. S.*, 376, § 155; 1 Arch., C.P. & Pl., 851; 4 Black. Com., 201; *State v. Zellers*, 2 Halset., 220; *Rex v. Greenacre*, 8 Car. & P., 35; *Murphy v. People*, 37 Ills., 448.

⁴ 2 Bish. Cr. P., § 617; *Com. v. Hawkins*, 3 Gray, 463; *Com. v. York*, 9 Met., 93; *Maher v. People*, 10 Mich., 212.

⁵ *Chase v. People*, 40 Ills., 358; *Hopps v. People*, 31 Ills., 385; *Brennan v. People*, 15 Ills., 517; *Barnett v. People*, 54 Ills., 330; *State v. McNally*, 32 Iowa, 580; *contra*, *State v. Boyle*, 28 Iowa, 522; *State v. Knouse*, 29 Iowa, 118.

⁶ *Petri v. People*, 65 Ills., 18.

the ordinary course of events must put the life of the deceased in jeopardy.¹

§ 336. **The Using of Dangerous Weapons, etc., Weapons, when Evidence of Malice.** — The using of a dangerous and deadly weapon with violence, without excuse, thereby producing death, is strong,² and according to some of the authorities,³ is conclusive evidence that the killing was with malice aforethought. Yet if the deadly weapon is employed neither with direct aim nor in a manner likely to be deadly in the particular instance, the law will not imply malice from the using of such weapon.⁴ The question of what is a deadly weapon where there is no dispute about the facts, is one of law for the court and not of fact for the jury.⁵

§ 337. **Gross Recklessness, when Evidence of Malice.** — Malice may be proved by evidence of gross recklessness of human life, whether it be the act of wanton sport, such as purposely and with intent to do hurt, riding a vicious horse into a crowd of people whereby death ensues,⁶ or by casting stones or other heavy bodies likely to create danger over a wall or from a building with intent to hurt the passers-by, one of whom is killed,⁷ or where a parent or master corrects a child in a savage or barbarous manner or with an instrument likely to cause death, whereof the child dies.⁸

¹ *People v. Rector*, 19 Wen., 606; *State v. Hissenkamp*, 17 Iowa, 25.

² *Clark v. State*, 8 Humph., 671; *Perry v. People*, 14 Ills., 498; *State v. Gillick*, 7 Iowa, 287; *State v. Neeley*, 20 Iowa, 109.

³ *Com. v. York*, 9 Met., 93; *Com. v. Webster*, 5 Cush., 295; *State v. Smith*, 2 Strob., 77; *Rex v. Thomas*, 7 Car. & P., 817. *Grey's Case*, J. Kel, 64; *Rex v. Hazel*, 1 Leach, 383; *U. S. v. McGlue*, 1 Curt. C. C., 1; *Green v. State*, 28 Missis., 687.

⁴ *State v. Roane*, 2 Dev., 53; *State v. West*, 6 Jones N. C., 505.

⁵ *State v. West*, 6 Jones N. C., 505; *contra*, *U. S. v. Small*, 3 Curtis C. C., 241.

⁶ *Hawks P. C.*, b. 1, c. 31, § 61; 1 *Ld. Raym.*, 143; *Foster*, 261; *Roscoe Cr. Ev.*, 710; *State v. Vance*, 17 Iowa, 138.

⁷ *Roscoe Cr. Ev.*, 710; 1 *East P. C.*, 234; *State v. Myers*, 19 Iowa, 517; *People v. Fuller*, 2 *Parker*, 16.

⁸ *Foster*, 262, 1 *Hale P. C.*, 474; 3 *Greenl. Ev.*, § 147; *Grey's Case*, J. Kel, 64.

§ 338. **Evidence of Malice — Previous Attempts to Assassinate — Threats, Declarations, etc., — Good Will.**— The former attempts of the defendant to assassinate the deceased, his former threats or declarations that his intentions were deadly, his expressions of a vindictive feeling towards him, the existence of any motive likely to instigate him to kill the deceased, his making preparations for the concealing of the body, the laying of a train of circumstances which may be calculated to break the surprise or baffle the curiosity which would probably be occasioned by the homicide, and any facts or circumstances showing a harbored design against his life, are admissible in evidence to show malice.¹ On the other hand, expressions of good will and acts of kindness on the part of the prisoner towards the deceased are always considered important evidence to show want of malice.² But the declarations of the accused about the deceased on the day of the killing, but some time after the offense was committed and at another place, are not evidence for the accused.³

§ 339. **When Malice may be Inferred from an Intent to Commit a Felony, etc.** — Whenever one does an act with the design of committing a felony, either at common law⁴ or by statute⁵ or such a misdemeanor as is likely to endanger human life,⁶ by which the life of another is accidentally but unintentionally taken, he is guilty of murder; because such conduct evinces a depraved mind and shows malice against all mankind;⁷ therefore, if a person designs to kill one person, and in carrying

¹ 1 Whart. Cr. L., §§ 635, 1113; *Benedict v. State*, 14 Wis., 424; *State v. Stanley*, 33 Iowa, 534; *Com. v. Madan*, 102 Mass., 1; but see *Albright v. State*, 6 Wis., 74.

² 1 Whart. Cr. L., § 635.

³ *Gardiner v. People*, 3 Scam., 83.

⁴ *Hawk P. C.*, 86, § 11; 1 *East P. C.*, 222; 2 *Bish. Cr. L.*, § 694; *Gore's Case*, 9 Co., 81a; *Rex v. Plummer*, J. Kel, 109; 12 *Mod.*, 627; *State v. Spencer*, 1 Zab., 196; *U. S. v. Ross*, 1 *Gallis C. C.*, 524; *Beets v. State*, Meigs, 106; *U. S. v. Travers*, 2 *Wheeler C. C.*, 508; *Brennan v. People*, 15 *Ills.*, 511.

⁵ *R. S.*, 374, § 145; *State v. Smith*, 32 *Me.*, 369; *State v. Shelledy*, 8 *Iowa*, 479; but see 1 *Roscoe Cr. Ev.*, 710.

⁶ *R. S.*, 374, § 145; 2 *Bish. Cr. L.*, § 691.

State v. Spencer, 1 Zab., 196; *State v. Benham*, 23 *Iowa*, 155.

out that design accidentally kills another,¹ or administers a drug to a pregnant woman, or does to her any criminal act with the design of procuring an abortion,² and thereby causes her death, he is guilty of murder.³

§ 340. **What a Sufficient Provocation to Show Want of Malice.**—Evidence that a sudden and considerable provocation caused the prisoner to do the fatal act may be received to show that the killing was without malice aforethought;⁴ as where a person is assaulted and strikes back without being influenced by passion, and unintentionally, but unnecessarily and unfortunately, kills his assailant,⁵ or where the mind is blinded by passion and the killing springs from the passions and not from malice,⁶ the offense is only manslaughter. Therefore, where two persons upon a sudden quarrel engage in a mutual combat, if either in the heat of it kill the other, though with a deadly weapon, his offense is only manslaughter,⁷ even though he made the first assault,⁸ and the fatal blow, prompted by the heat of the fight, was given with intent to take life.⁹

¹ *Reg. v. Smith*, 33 Eng. L. & Eq., 567; *State v. Smith*, 2 Strob., 77; *State v. Cooper*, 1 Green N. J., 362.

² 1 Hale P. C., 429; 1 East P. C., 230; *Com. v. Keeper*, 2 Ashm., 227; *Com. v. Parker*, 9 Met., 263, 265; *State v. Moore*, 25 Iowa, 123.

³ *Roscoe Cr. Ev.*, 709; 2 Bish. Cr. L., § 691.

⁴ *R. S.*, 374, § 140; *Id.*, §§ 144, 145; *Preston v. State*, 25 Miss., 383; *Campbell v. State*, 23 Ala., 44; *Com. v. Hare*, 4 Penn. L. Jour., 257; *State v. Norris*, 1 Hayw., 429; *Peri v. People*, 65 Ills., 18; *State v. Varice*, 17 Iowa, 138; *State v. Decklotts*, 19 Iowa, 448; *Kriel v. Com.*, 5 Bush. Ky., 363.

⁵ *R. S.*, 374, § 145; *People v. Harper*, 1 Edm. Sil. Cas., 180; *Stoffer v. State*, 15 Ohio 47; *Com. v. Dunn*, 8 Smith Pa., 9; *U. S. v. Wilberger*, 3 Wash. C. C., 515; *Young v. State*, 11 Humph., 200; *State v. Tackett*, 1 Hawks, 210; *Nelson v. State*, 10 Humph., 518.

⁶ *Preston v. State*, 25 Miss., 383; *State v. Hill*, 4 Dev. & Bat., 491, 496; *Haile v. State*, 1 Swan Tenn., 248; *Young v. State*, 11 Humph., 200.

⁷ *Rex v. Snow*, 1 Leach, 151; 1 East P. C., 224; *Com. v. Biron*, 4 Dall., 125; *Allen v. State*, 5 Yerg., 453; *State v. Roberts*, 1 Hawk., 349; *Rex v. Ayres*, Russ. & Ry., 43; *U. S. v. Mingo*, 2 Curt. C. C., 1.

⁸ *State v. Floyd*, 6 Jones N. C., 392; *State v. Hill*, 4 Dev. & Bat., 491; *State v. Curry*, 1 Jones N. C., 280.

⁹ *Quarles v. State*, 1 Sneed Tenn., 407; *Rex v. Taylor*, 5 Burr, 2793; *Rex v. Snow*, 1 Leach, 151.

If, however, he made the first assault without provocation, and the person killed only acted in self-defense;¹ or if he commenced the quarrel with intent to kill his adversary² or to do him great bodily harm,³ or continued the fight after he had had time for his passions to cool,⁴ or after he had overpowered his adversary willfully and deliberately killed him;⁵ or if the homicide was not the result of passion,⁶ or if in the heat of passion he defends himself with a deadly weapon, and uses it in a cruel manner not justified at all by the nature and danger of the assault,⁷—the offense amounts to murder. The accused cannot justify the killing of the deceased with whom he has provoked a quarrel for the purpose of getting an opportunity to take his life.⁸

§ 341. *Continued.*—The provocation must be considerable.⁹ A slight blow,¹⁰ or an intent to commit an assault,¹¹ or a libel¹² or a suspicion of adultery with one's wife, or¹³ the adultery of an-

¹ *Huget's Case*, J. Kel, 59, 61; *Anonymous*; J. Kel, 58; *State v. Hill*, 4 Dev. & Bat., 491; *Reg. v. Mawgridge*, J. Kel, 119; *Murphy v. People*, 37 Ills., 447.

² *Adams v. People*, 47 Ills., 376; *State v. Neeley*, 20 Iowa, 109; *Reg. v. Kirkham*, 8 Car. & P., 115; *Rex v. Mason*, 1 East P. C., 239; *Kennedy v. People*, 40 Ills., 488; *State v. Benham*, 23 Iowa, 155; *Reg. v. Smith*, 8 Car. & P., 160; *State v. Johnson*, 1 Ired., 354; *State v. Tilley*, 3 Ired., 424; *Copeland v. State*, 7 Humph., 479.

³ *Stewart v. State*, 1 Ohio 66; *People v. Rector*, 19 Wen., 606.

⁴ *State v. McCants*, 1 Speers, 384; *Com. v. Green*, 1 Ashm., 289; *Onbey's Case*, 2 Str., 766; 2 Ld. Raym, 1489.

⁵ *Rex v. Shaw*, 6 Car. & P., 372; *Com. v. Crane*, 1 Va. Cas., 78; *King v. Com.*, 2 Va. Cas., 78; *State v. Scott*, 4 Ired., 409; *Shorter v. People*, 2 Com., 193.

⁶ 1 Hawk P. C., 96; *State v. Johnson*, 1 Ired., 354; *Com. v. Green*, 1 Ashm., 289.

⁷ *Rex v. Lynch*, 5 Car. & P., 324; *State v. Crayton*, 6 Ired., 164; *State v. Curry*, 1 Jones N. C., 280; *Rex v. Thomas*, 7 Car. & P., 817.

⁸ *Kennedy v. People*, 40 Ills., 488; *State v. Benham*, 23 Iowa, 155; *State v. Stanley*, 33 Iowa, 532.

⁹ R. S., 374, §§ 143, 144; *Petri v. People*, 65 Ills., 18.

¹⁰ *Stedman's Case*, Foster, 292; *Com. v. Mosler*, 4 Barr., 264.

¹¹ *Copeland v. State*, 7 Humph., 479; *Prickett v. State*, 22 Ala., 39.

¹² *State v. Will*, 1 Dev. & Bat., 121, 169.

¹³ *State v. Avery*, 64 N. C., 608.

other's wife,¹ or mere words,² is or are not a sufficient justification to reduce the offense of killing another to manslaughter. But an assault³ or battery not sufficient to endanger life,⁴ or an assault with provoking words,⁵ or an illegal arrest,⁶ or detecting another in the act of adultery with one's wife,⁷ or of sodomy with his son,⁸ or in stealing from his pocket,⁹ is a sufficient provocation to reduce the offense of killing another to manslaughter. Of course whether these acts are or are not sufficient to mitigate the offense to manslaughter will depend upon the circumstances of each case.

§ 342. **Time for the Passions to Cool.** — In every case of homicide, however great the provocation may be, if there be a sufficient time for the passions to subside or cool and for reason to interpose, such homicide will be murder.¹⁰ The question of what is a sufficient time for the passions to cool, is one of law and not of fact.¹¹ They must cool in a reasonable time;¹² that is, in such a time as the passions of an ordinary man under the like circumstances would cool.¹³ In one case an hour

¹ *People v. Horton*, 4 Mich., 67.

² 1 Hawks P. C., 98, § 33; *Beauchamp v. State*, 6 Blackf., 299; *State v. Barfield*, 8 Ired., 344; *Felix v. State*, 18 Ala., 720; *Ogden v. Claycomb*, 52 Ill., 365; *Lord Morley's Case*, 6 Howell St., Tr., 66; *Rapp v. Com.*, 14 B. Monr., 614.

³ *Ray v. State*, 15 Ga., 223.

⁴ *State v. Sizemore*, 7 Jones N. C., 206.

⁵ *Reg. v. Sherwood*, 1 Car. & K., 556.

⁶ *Rand v. Davis*, 7 Car. & P., 785; *Reg. v. Tooley*, 11 Mod., 242; *Rex v. Thompson*, 1 Moody, 80; *Roberts v. State*, 14 Mo., 138; *Jones v. State*, 14 Mo., 409.

⁷ Hawks P. C., 98, § 36; *Foster*, 298; *Reg. v. Kelly*, 2 Car. & K., 814; *Pearson's Case*, 2 Lewin, 216; *State v. John*, 8 Ired., 330; *State v. Samuel*, 3 Jones N. C., 73.

⁸ *Reg. v. Fisher*, 8 Car. & P., 182.

⁹ *Rex v. Fray*, 1 East P. C., 236; 1 Hawks P. C., 99, § 38.

¹⁰ R. S., 374, § 144; *Foster*, 296; *Haywood's Case*, 6 Car. & P., 157; *Reg. v. Kirkham*, 8 Car. & P., 115; *People v. Sullivan*, 3 Seld., 396.

¹¹ 2 Bish. Cr. L., § 713; *State v. McCants*, 1 Speers, 384; *State v. Craton*, 6 Ired., 164; *State v. Dunn*, 18 Mo., 419; *Rex v. Fisher*, 8 Car. & P., 182; *Beauchamp v. State*, 6 Blackf., 299; *Felix v. State*, 18 Ala., 720; *Rex v. Beeson*, 7 Car. & P., 142; *State v. Jones*, 20 Mo., 58.

¹² *Id.*

¹³ *Kirkpatrick v. Com.*, 7 Casey Pa., 198.

was deemed a sufficient time for the passions to cool.¹ In another from the morning until the afternoon was deemed sufficient.² If two persons quarrel in the morning, and by agreement meet and fight in the afternoon, or on the next day, their passions will be presumed to have cooled, and if one kills the other he will be guilty of murder.³ If after the provocation the prisoner falls into other discourse and talks deliberately upon other subjects, or pursues any other business or design not connected with the immediate object of his passion nor subservient thereto, so that it may be reasonably supposed that his attention was once called off from the subject of the provocation, any subsequent killing of his adversary is murder.⁴ Where a weapon is brought from a distance after the provocation and then concealed, this is evidence that there was a sufficient time for the passions to cool.⁵

§ 343. **Dueling.**—It is not only murder for one man to kill another in a duel,⁶ but the seconds of both parties,⁷ and all others present giving countenance and encouragement to the transaction, are also guilty of murder,⁸ for the interval between the time of the agreement to fight and the killing is sufficient for the voice of reason and humanity to be heard, and therefore the killing is attributed to deliberate revenge and punished as murder.⁹

§ 344. **After the Passions have had Time to Cool, a Provocation may be Evidence of Malice.**—After the passions have had time

¹ Reg. v. Oneby, 2 Stra., 766; 2 Ld. Raym., 1485.

² Rex v. Legg, J. Kel, 27.

³ 1 Hawks P. C., 96, § 22; 2 Bish. Cr. L., 712; but see Maher v. People, 10 Mich., 212, 223.

⁴ Com. v. Greene, 1 Ashm., 289.

⁵ State v. Norris, 1 Hayw., 429.

⁶ Smith v. State, 1 Yerg., 228; 1 East P. C., 242; R. S., 361, § 68; Mawgridge's Case, 17 Howel St. Tr., 57, 66; 2 Howel St. Tr., 1033, 1038.

⁷ 1 Hawks P. C., 97, § 31; Reg. v. Young, 8 Car. & P., 644; Reg. v. Cuddy, 1 Car. & K., 210; Reg. v. Baronet, Dears, 51; *contra*, 1 Hale P. C., 442.

⁸ 2 Bish. Cr. L., 311.

⁹ R. S., 374, § 144.

to cool,¹ or are in fact cooled, or if the passions have never been excited,² the provocation may be and often is the cause of malice, and instead of mitigating the offense, furnishes the motive for the killing, and is evidence to show actual malice.³ When there is proof of express malice at the time of committing the act, the provocation will not reduce the offense to manslaughter.⁴ Where malice has once been shown to exist it will be presumed to have continued up to the time of the commission of the act, and the burden of proof is on the slayer to rebut this presumption.⁵

§ 345. **Malice need not have Existed for any Considerable length of Time before the Killing.**—The words “malice aforethought” do not imply deliberation or the lapse of a considerable time between the malicious intent to take life and the actual execution of that intent.⁶ Therefore, whether the design to effect death was formed on the instant or had previously been entertained, is immaterial, for the malicious killing in either case is murder.⁷

§ 346. **6. The Time and Place must be Proved.**—The time of both the injury and the death must be proved, so that the death may appear to have taken place within a year and a

¹ *People v. Sullivan*, 3 Seld., 396; *Ld. Morley's Case*, 7 St. Tr., 421; *Rex v. Campbell*, Boston L. Rep., 324; *State v. Yarborough*, 1 Hawks, 78; *Rex v. Thomas*, 7 Car. & P., 817.

² 1 Hawks P. C., 96, § 23; *State v. Johnson*, 1 Ired., 354; *Com. v. Green*, 1 Ashm., 289, 298; *State v. Green*, 37 Mo., 466.

³ Whart. Cr. L., § 635; 1 East P. C., 252; *State v. Stanley*, 33 Iowa, 534.

⁴ *State v. Johnson*, 1 Ired., 354; *State v. Ferguson*, 2 Hill S. C., 619; *State v. Lane*, 4 Ired., 113; *State v. Tilley*, 3 Ired., 424; *Stewart v. State*, 1 Ohio S. R., 66; *Jones v. State*, 14 Mo., 409; *State v. Martin*, 2 Ired., 101; *Green v. State*, 13 Missis., 382; *Milchum v. State*, 11 Ga., 615.

⁵ *State v. Johnson*, 1 Ired., 354; *State v. Tilley*, 3 Ired., 424; *Shoemaker v. State*, 12 Ohio, 43; *Com. v. Green*, 1 Ashm., 289; *State v. Hildreth*, 9 Ired., 429.

⁶ *Com. v. Webster*, 5 Cush., 295; *Petri v. People*, 65 Ills., 18; *State v. Deeklots*, 19 Iowa, 447; *Bohannon v. Com.*, 8 Bush. Ky., 481.

⁷ *People v. Austin*, 1 Park. C. R., 154; *People v. Clark*, 3 Seld., 385; *Mitchum v. State*, 11 Ga., 615; *Green v. State*, 13 Mo., 382; *Rex v. Legg*, J. Kel, 27, 128; *Beauchamp v. State*, 6 Blackf., 299; *U. S. v. Cornell*, 2 Mason, 60, 91; *McAdams v. State*, 25 Ark., 405.

day after the mortal injury.¹ The place where the injury was inflicted or the cause of death administered, or where the party died, must be proved, so that it may appear that the court has jurisdiction to try the offense.²

§ 347. **Party Killing in one County and Party Killed in Another.** — The statute provides that “if the party killing shall be in one county and the party killed be in another county at the time the cause of death shall be administered or inflicted, or if it is doubtful in which of the several counties the cause of death was administered or inflicted, the accused may be tried in either county.”³

§ 348. **Cause Administered in one County, Death Occurring in Another.** — “If the cause of death is administered or inflicted in one county, and the party die within another county, or without the state, the accused shall be tried in the county where the cause of death was administered or inflicted.”⁴

DEFENSES.

§ 349. **Self-Defense.** — The statute provides that “if any person kill another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm,⁵ the killing of the other was absolutely necessary; and it must appear also that the person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline

¹ R. S., 374, § 147; 2 Bish. Cr. L., § 640; *State v. Orvell*, 1 Dev., 139.

² R. S., 406, §§ 395–402; *Rice v. People*, 38 Ills., 435; *Jackson v. People*, 40 Ills., 405.

³ R. S., 407, § 397. This section of the statute is not unconstitutional, *State v. Pauley*, 12 Wis., 537.

⁴ R. S., 407, § 398.

⁵ An instruction that in order to justify the killing the threatened danger must be so great as to create a reasonable belief in the mind of the accused of imminent peril to life or the most serious bodily harm, is erroneous. The words “great bodily harm” as used in the statute, fall far short of “the most serious bodily harm.” *Reins v. People*, 30 Ills., 257; *State v. Benham*, 23 Iowa, 155. The terms “great personal injury” have been held equivalent in import to the terms “great bodily harm.” *Green v. State*, 28 Missis., 687.

any further struggle before the mortal blow was given."¹ The defendant is not entitled to the benefit of the plea of self-defense if he sought the deceased with a view to provoke a difficulty or to bring on a quarrel.²

§ 350. *Continued* — **What Danger Sufficient to Excuse the Killing.** — It has been held under the statute that actual danger is not indispensable to justify the killing of another in self-defense.³ If the danger is so imminent and pressing that a prudent man would suppose that it was necessary to take the life of his assailant to save his own or prevent his receiving great bodily harm, then the killing is justifiable if the person menaced acted in good faith.⁴ Men threatened with danger must judge from things about them of the necessity for self-defense, and will not be responsible criminally for acting on honest convictions where other judicious men would have been alike mistaken as to the extent of the danger.⁵ It cannot, however, be said that one doing all in his power to take the life of another with a gun is justified in so doing, because the person assaulted endeavors to dispossess him of the weapon as a means of preserving his own life, though this act may have unintentionally contributed to the discharge of the gun.⁶ The jury must determine whether the circumstances surrounding a homicide were such as to induce a belief in a reasonable mind that the act was necessary to save his own life or that of a wife or child.⁷

§ 351. **What Evidence Admissible to Explain the Motives of the**

¹ R. S., 375, § 149.

² *State v. Neeley*, 20 Iowa, 109-116; *State v. Stanley*, 33 Iowa, 532.

³ *Campbell v. People*, 16 Ills., 17; *Hopkinson v. People*, 18 Ills., 266; *Williams v. People*, 54 Ills., 423; *Oliver v. State*, 17 Ala., 586; *Pritchett*, 22 Ala., 39; *Noles v. State*, 26 Ala., 31.

⁴ *Campbell v. People*, 16 Ills., 17; *Maher v. People*, 24 Ills., 241; *Com. v. Woodward*, 102 Mass., 155; *Adams v. People*, 47 Ills., 376; *Ogden v. Claycomb*, 52 Ills., 366; *State v. Benham*, 23 Iowa, 154; *State v. Burke*, 30 Iowa, 331; *Petri v. People*, 65 Ills., 18; *State v. Neeley*, 20 Iowa, 109.

⁵ *Campbell v. People*, 16 Ills., 17; *State v. Collins*, 32 Iowa, 39.

⁶ *Murphy v. People*, 37 Ills., 448; *State v. Benham*, 23 Iowa, 155.

⁷ *Schnier v. People*, 23 Ills., 17; *Williams v. People*, 54 Ills., 422; *People v. Austin*, 1 Parker Cr. R., 154.

Accused — Threats. — Every circumstance connected with the alleged homicide which would tend to induce a belief in the mind of a prudent man that it was necessary to take the life of the deceased to save his own, or prevent his receiving great bodily harm, or to excuse or palliate the conduct of the party charged, or explain his motives, should be received in evidence and be submitted to the jury.¹ For this purpose evidence that tended to show that the fatal blow was struck while the prisoner and deceased were engaged in a fight which was the result of a conspiracy between the deceased and several others “to clean out or whip” the prisoner and his friends, the arrangement being that the deceased should make an attack upon the prisoner, which he did (it appearing that the prisoner knew of the conspiracy at the time of the attack and of all that was done in pursuance of the conspiracy upon him) is competent.² So evidence of threats made by the deceased, if known to the accused at the time of the homicide, is competent to enable the jury to determine whether the prisoner was prompted by a reasonable and well-grounded belief that he was in danger of losing his life or suffering great bodily harm.³ But evidence of such threats is not competent unless shown to have been known to the deceased before the homicide,⁴ or if made a long time previous thereto.⁵ It is proper for the defendant where there is evidence tending to show that the killing was in self defense, to give evidence that before the homicide he knew, or had good reason to believe, that the deceased was a man of great muscular strength, practiced in seizing persons by the throat in a peculiar way, which

¹ *Williams v. People*, 54 Ills., 423.

² *Id.*

³ *Campbell v. People*, 16 Ills., 18; *Dupree*, 33 Ala., 380; *Monr. v. State*, 5 Ga., 85; *Pritchett v. State*, 22 Ala., 39; *Keener v. State*, 18 Ga., 194; but see *People v. Rector*, 19 Wen., 569.

⁴ *Keener v. State*, 18 Ga., 194; *Atkins v. State*, 16 Ark., 568; *Newcomb v. State*, 37 Missis., 383; *Lingo v. State*, 29 Ga., 470; *Cocker v. State*, 2 Ark., 53; *Powell v. State*, 19 Ala., 577; *Adams v. People*, 47 Ills., 376; *contra*, *People v. Rector*, 16 Ills., 18; *Cornelius v. Com.*, 15 B. Monr., 539.

⁵ *Monroe v. State*, 5 Ga., 85; *State v. Jackson*, 17 Mo., 544; *State v. Hays*, 23 Mo., 287; *Keener v. State*, 18 Ga., 194.

would render them helpless,¹ or was a savage, quarrelsome, dangerous and vicious man,² or was armed with a deadly weapon,³ for the purpose of showing that he had good reason to believe that his own life was in danger.

§ 352. **When the Necessity for Killing in Self-Defense must be Avoided.** — When a man expects to be attacked, his right to defend himself does not arise until he has done everything to avoid the necessity.⁴ Even if another is meditating his life, he must wait until some overt act is done and the danger becomes immediate before he is justified in the killing.⁵ Yet it has been held that if one has been assaulted by another who has threatened to kill him, he is not bound to run and escape in the particular instance, thus increasing his danger by encouraging the assailant to repeat the attempt when he will perhaps be less prepared to resist.⁶ In such case it is presumed that the circumstances must be such that a prudent man would suppose that it was necessary to take the life of his assailant to save his own or to prevent his receiving great bodily harm either then or at some future time.⁷ A man, as a general rule, has no right to stand on his ground and kill his adversary if he knows he can avoid it by running, because such homicide is not necessary,⁸ though it has been said that

¹ *Dukes v. State*, 1 Ind., 557, 565; *People v. Murray*, 10 Cal., 309; *contra*, *Com. v. Mead*, 12 Gray, 167, 169.

² *Pritchett v. State*, 22 Ala., 39; *State v. Smith*, 12 Rich., 430; *Pfomer v. People*, 4 Park. Cr. R., 558; *contra*, *State v. Field*, 14 Me., 244; *People v. Anderson*, 2 Wheeler C. C., 390.

³ *Vandermark v. People*, 47 Ills., 123; *Campbell v. People*, 16 Ills., 17; *State v. Thompson*, 9 Iowa, 188, 192; *Tweedy v. State*, 5 Iowa, 433.

⁴ 1 East P. C., 271, 272; *People v. Sullivan*, 3 Seld., 396; *Atkins v. State*, 16 Ark., 568; *Reins v. People*, 30 Ills., 257; *contra*, *Bohannon v. Com.*, 8 Bush. Ky., 48.

⁵ *Dyson v. State*, 26 Missis., 362; 2 East P. C., 272; *State v. O'Conner*, 31 Mo., 389; *Lander v. State*, 12 Texas, 462; *Hinton v. State*, 24 Texas, 454.

⁶ *Phillips v. Com.*, 2 Duvall, 328; *Tweedy v. State*, 5 Iowa, 433; *Bohannon v. Com.*, 8 Bush. Ky., 481.

⁷ *Campbell v. People*, 16 Ills., 17; *Maher v. People*, 24 Ills., 241; *Bohannon v. Com.*, 8 Bush. Ky., 482.

⁸ 1 Hale P. C., 479-481; 4 Black. Com., 185; *Shorter v. People*, 2 Com., 193; *Greschia v. People*, 53 Ills., 295, 301; *Pierson v. State*, 12 Ala., 149; *State v. Vance*, 17 Iowa, 138; *State v. Benham*, 23 Iowa, 155.

when there is reasonable ground to believe that the attack is with a murderous or felonious intent, the person attacked is under no obligation to fly, because it is his duty to prevent and arrest all persons attempting to commit a felony, therefore he may stand his ground, and if need be kill his adversary.¹ It has been held to be the same where the attack is with a deadly weapon.²

§ 353. **What Force may be Used in Self-Defense.** — A person has no right to use any more force in self-defense than a person of ordinary prudence would deem necessary under the circumstances.³ If he is struck with the naked hand, and there is no reason to believe there is a design to do him great bodily harm, he will not be justified in returning blows with a dangerous weapon.⁴ Even if a felonious attack is made upon him with intent to kill him, he has no right needlessly to kill his assailant if it is not necessary for his defense and he has no sufficient reason to believe that it is.⁵ If one needlessly shoots a felon instead of having him arrested, he commits a felonious homicide.⁶

§ 354. **Defense of Others.** — The master and servant, parent and child, husband and wife, killing an assailant in the necessary defense of each other respectively are excused, the act of the relation assisting being construed the same as the act of the party himself.⁷ Generally one may do for another

¹ Foster, 272; 3 Inst., 56; 1 East P. C., 271; State v. Mullen, 14 La. An., 570; State v. Thompson, 9 Iowa, 188; State v. Harris, 1 Jones N. C., 190; Tweedy v. State, 5 Iowa, 433; State v. Kennedy, 20 Iowa, 569.

² State v. Thompson, 9 Iowa, 183, 192; State v. Collins, 32 Iowa, 38.

³ Greschia v. People; 53 Ills., 295, 301; 1 East P. C., 280, §51; Foster, 273; People v. Doe, 1 Manning, 451; State v. Hoover; 4 Dev. & Bat., 365.

⁴ Shorter v. People, 2 Com., 193; Atkins v. State, 16 Ark., 568; Stewart v. State, 1 Ohio N. S., 66; State v. Scott, 4 Ired., 409; State v. Vance, 17 Iowa, 138.

⁵ 1 Bish. Cr. L., § 842; State v. Tweedy, 11 Iowa, 350; State v. Neeley, 20 Iowa, 108; State v. Thompson, 9 Iowa, 188; State v. Collins, 32 Iowa, 39.

⁶ Rex v. Scully, 1 Car. & P., 319; Holloway's Case, W. Jones, 198; Cro. Car., 137.

⁷ 1 Hale, 484; 4 Black. Com., 186; U. S. v. Wilberger, 3 Wash., C. C., 515; Com. v. Riley, Thach. Cr. Cas., 471; Short v. State, 7 Yerg., 510; Schnier v. People, 23 Ills., 17; Rex v. Bourne, 5 Car. & P., 120; Pond v. People, 8 Mich., 150; Statten v. State, 30 Missis., 619; Sharp v. State, 19 Ohio, 379.

what he may do for himself.¹ Therefore a guest in a house may defend the house,² or the neighbors of the occupant may assemble for that purpose.³

§ 355. **Defense of Property.** — All reasonable and necessary force may be used to defend one's real and personal property of which he is in the actual possession against another who comes to dispossess him without right.⁴ But he can never innocently carry this defense to the extent of killing the aggressor except in defense of his dwelling-house, called his castle.⁵ If no way but that is left him, he must yield and get himself righted by resort to law.⁶ If, however, in employing necessary force in such defense, the party resisted is accidentally killed, the homicide is not punishable unless a dangerous weapon or more force is used than is necessary when other means would have been sufficient.⁷

§ 356. **By an Officer Resisted.** — "If an officer in the execution of his office, in a criminal case, having legal process, be resisted and assaulted, he shall be justified if he kills the assailant. If any officer or private person attempt to take a person charged with treason, murder, rape, burglary, robbery, arson, perjury, forgery, counterfeiting or other felony, and he be resisted in the endeavor to take the person accused, and, to prevent the escape of the accused, by reason of such resistance, he be killed, the officer or private person so killing

¹ 1 Bish. Cr. L., § 877, 1 East P. C., 289, 292, 293; *Rex v. Adley*, 1 Leach, 206; *Com. v. Drew*, 4 Mass., 391; *Reg. v. Tooley*, 11 Mod., 242.

² *Curtis v. Hubbard*, 4 Hill N. Y., 437; *Cooper's Case*, Cro. Car., 544.

³ *Semayne's Case*, 5 Co., 91.

⁴ 1 East P. C., 402; *Rex v. Ford*, J. Kel., 51; *Harrington v. People*, 6 Barb., 607; *Com. v. Kennard*, 8 Pick., 133; *State v. Godsey*, 13 Ired., 348.

⁵ 1 Chitty Cr. L., 56; *Semayne's Case*, 5 Co., 91; *State v. Morgan*, 3 Ired., 186; *State v. Smith*, 3 Dev. & Bat., 117; *Com. v. Drew*, 4 Mass., 391; *Monroe v. State*, 5 Ga., 85; *State v. Vance*, 17 Iowa, 138; *State v. Zellers*, 2 Halst., 220; *Carrol v. State*, 23 Ala., 28; *Roberts v. State*, 14 Mo., 138; *Moore v. Hussey* Hob., 93, 96.

⁶ *U. S. v. Wilberger*, 3 Wash. C. C., 515.

⁷ 1 Halc P. C., 473; *Foster*, 291; *State v. Zellers*, 2 Halst., 220; *Com. v. Drew*, 4 Mass., 391; *McDaniel v. State*, 8 Sm. & M., 401; *Wild's Case*, 2 Lewin, 217.

shall be justified: *Provided*, that such officer or private person, previous to such killing, shall have used all reasonable efforts to take the accused without success, and that from all probability there was no prospect of being able to prevent injury from such resistance, and the consequent escape of such accused person."¹

§ 357. **According to Lawful Sentence.** — "Justifiable homicide may also consist in unavoidable necessity, without any will or desire, and without any inadvertence or negligence in the party killing. An officer who, in the execution of public justice, puts a person to death in virtue of a judgment of a competent court of justice, shall be justified. The officer must, however, in the performance of his duty, proceed according to the sentence and law of the land."²

§ 358. **By Misadventure.** — "Excusable homicide, by misadventure, is when a person is doing a lawful act, without any intention of killing, yet unfortunately kills another, as where a man is at work with an ax, and the head flies off and kills a bystander, or where a parent is moderately correcting his child, or a master his servant or scholar, or an officer punishing his criminal, and happens to occasion death, it is only a misadventure, for the act of correction was lawful; but if a parent or master exceed the bounds of moderation, or the officer the sentence under which he acts, either in the manner, the instrument, or quantity of punishment, and death ensue, it will be manslaughter or murder, according to the circumstances of the case."³

§ 359. **Other Defenses.** — "All other instances which stand upon the same footing of reason and justice as those enumerated, shall be considered justifiable or excusable homicide."⁴

§ 360. **Defendant, when Discharged.** — "The homicide appearing to be justifiable or excusable, the person indicted shall, upon his trial, be fully acquitted and discharged."⁵

¹ R. S., 375, § 150.

² Id., § 151.

³ Id., § 152; *State v. Benham*, 23 Iowa, 155.

⁴ R. S., 375, § 153.

⁵ Id., § 154.

§ 361. **Burden of Proof.** — “The killing being proved, the burden of proving circumstances of mitigation, or that justify or excuse the homicide, will devolve on the accused, unless the proof on the part of the prosecution sufficiently manifests that the crime committed only amounts to manslaughter, or that the accused was justified or excused in committing the homicide.”¹

§ 362. **Petit Treason.** — At common law petit treason was the unlawful, felonious and malicious killing of another to whom the offender owed allegiance of private and domestic faith, there being a relation of trust and confidence between the parties, making it the duty of the offender to protect and defend the person killed, which trust and confidence was betrayed by the treachery and breach of faith of the offender in committing the homicide.² As where a servant kills his master, a wife her husband, and a child his parent. But by statute the distinction between petit treason and murder is abolished. Any person who might have been indicted for petit treason must hereafter be indicted for murder, and if convicted, be punished accordingly.³

§ 363. **Murder by Arson.** — If the life of any person is lost by willfully and maliciously burning any building of another, or any church meeting-house, school-house, state-house, court-house, work-house, jail, or other public building, or any boat or other water-craft, or any bridge of the value of fifty dollars, erected across any of the waters of this state, the statute provides that the offender or person so burning or causing such burning shall be deemed guilty of murder and punished accordingly.⁴

¹ R. S., 376, § 155.

² 3 Chitty Cr. L., 742; 4 Black. Com., 75.

³ R. S., 374, § 141.

⁴ Id., 354, § 13; see statute in full, post § 443.

STATEMENT OF THE OFFENSE OF MURDER BY ARSON.

(Commence as in the form on page 35) that C. D., on, etc., at, etc., in the said county, did feloniously,¹ willfully and maliciously,² set fire to and burn (or "*cause to be set fire to and burned,*") a certain barn of the value³ of — dollars, situated in the town of — in the county aforesaid, then and there being the property of another person, *to wit.*, of G. H., the said G. H. then and there being in the said barn and in the actual possession of the same; and that in consequence of such burning as aforesaid the said G. H. then and there lost his life by being then and there burned in the said barn, by reason whereof the said G. H. then and there instantly died (or "*languished a short time and then, on the — day of — A. D. 18 —, and there died*"), whereby the said C. D., in the manner and form aforesaid, in the county aforesaid, unlawfully, feloniously, with malice aforethought, did kill and murder the said G. H. in the peace of the people then and there being, contrary to the form of the statute in such case made and provided (*conclude as in the form on page 35*).

§ 364. Evidence. — A design to produce death is not essential to constitute the offense of murder by arson if the burning was willful and malicious; and it is immaterial whether the prisoner knew that there was any person in the building or not except to show malice.⁴

§ 365. Murder by Perjury. — "Every person who by willful and corrupt perjury, or subornation of perjury, shall procure the conviction and execution of any innocent person, shall be deemed and adjudged guilty of murder, and punished accordingly."⁵

¹ As to the necessity of the word "feloniously," see argument of Scates, *Clark v. People*, 1 Scam., 118; 1 Arch. C. P. & Pl., 301.

² The words "willfully and maliciously" are in the statute, R. S., 354, § 13, and necessary; 2 Bish. Cr. P., § 43; *Jesse v. State*, 28 Missis., 100.

³ When a part of the punishment for the offense of arson was a fine double the value of the property burned, it was necessary to state its value. *Clark v. People*, 1 Scam., 120. And if the courts should hold that the words "of the value of fifty dollars" apply to all the buildings mentioned in the statute, it would still be necessary to allege that the property was of such value; but if they should hold otherwise, it would be unnecessary. *Com. v. Hamilton*, 15 Gray, 480.

⁴ *People v. Orcutt*, 1 Park. Cr. R., 252.

⁵ R. S., 387, § 226.

STATEMENT OF THE OFFENSE OF MURDER BY PERJURY.

(Commence as in form on page 35) that at a circuit court held at the courthouse in the — of —, in and for the said county of —, in the said State of Illinois, on the — day of —, A. D., 18—, before the Hon. —, judge of the said court, then and there being duly elected and qualified as such judge presiding, a certain indictment then depending in the said court against one J. K. came on to be tried, and was then and there in due form of law tried by a jury of the said county, in due manner taken and sworn for that purpose, in and by which said indictment it was charged and alleged (*here set forth the indictment for the murder of L. M.*). And this deponent further says, that at and upon the trial of the said J. K. upon the said indictment, C. D. did then and there appear, and was then and there produced as a witness for and in behalf of the people of the said state of Illinois against the said J. K., and he the said C. D. was then and there in open court duly sworn (*or "affirmed"*) as such witness as aforesaid, before the said court and jury by —, then and there being the clerk of the said court, and then and there having full power and authority to administer the said oath (*or "affirmation"*) that the evidence which he the said C. D. should give to the court and jury so sworn, between the people of the said State of Illinois and the said J. K., should be the truth, the whole truth, and nothing but the truth, and it then and there, upon the trial of the said J. K. on the said indictment, became and was a material question whether the said J. K. did strike and kill the said L. M., and thereupon the said C. D., being so sworn as aforesaid, and having so taken a lawful oath in the said judicial proceeding, where by law an oath (*or "affirmation"*) was required then and there unlawfully, willfully, corruptly and feloniously, with malice aforethought, contriving and intending to procure and cause the said J. K. to be unjustly convicted of the said offense of murder charged in the said indictment and to be executed therefor, did then and there, knowingly, falsely, corruptly, willfully, maliciously and feloniously swear (*"or affirm"*) say, depose and give in evidence to the jurors of the said jury before the said judge in said court, among other things, that the said J. K. did strike and kill the said L. M.; whereas, in truth and in fact the said J. K. did not strike or kill the said L. M.; whereby the said C. D. did then and there knowingly, willfully and corruptly swear falsely and commit willful and corrupt perjury, and thereby then and there unlawfully, willfully and feloniously, with malice aforethought did procure the conviction of the said J. K., then and there being an innocent person.

And this deponent further says, that the said C. D., by the said willful and corrupt perjury, so committed by him as aforesaid upon the said trial, did unlawfully, feloniously, and willfully, with malice aforethought, kill and murder the said J. K. then and there being in the peace of the people, contrary to the form of the statute in such case made and provided. (*conclude as in form on page 35*).

§ 366. **Murder by Producing a Miscarriage.** — Both by statute¹ and at common law² a person procuring or causing an abortion or miscarriage, when not necessary for the preservation of the mother's life, if the mother dies, is guilty of murder.

STATEMENT OF THE OFFENSE OF MURDER BY PRODUCING A
MISCARRIAGE.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, did unlawfully, feloniously and willfully, with malice aforethought, administer to one G. H., then and there being a woman pregnant with child and in the peace of the people, a certain noxious substance called savin, with intent then and there to produce the miscarriage of the said G. H., and did thereby unlawfully, feloniously and willfully, with malice aforethought, cause the miscarriage of the said G. H., it not being then and there necessary to cause such miscarriage for the preservation of the life of the said G. H. (the said C. D. then and there well knowing that the said noxious substance would produce such miscarriage), by reason whereof the said G. H. languished a short time and then, on the — day of —, A. D. 18—, and there died (or "*then and there instantly died*") (conclude as in form on page 35).

§ 367. **Murder by Displacing Switch.** — The statute provides that "whoever willfully and maliciously displaces any switch, signal or rail of any railroad, or breaks down, or rips up, injures or destroys, any track, bridge or other portion of any railroad, or places any obstructions thereon, or places any false signal upon or along the line of any railroad track, or does any act to any engine, machine or car of such railroad, with intent that any person or property being or passing on or over such railroad should be injured thereby, shall be imprisoned in the penitentiary not less than one nor more than five years. Or if, in consequence of any such act, done with such intent, any person being or passing on or over such railroad suffers any bodily harm, or any property is injured, the person so offending shall be imprisoned in the penitentiary not less than three nor more than ten years. And if, in consequence of any such act, done with such intent, any person is

¹ R. S., 353, § 3. For the statute in full, see *post* § 378.

² *Tickler's Case*, 1 East P. C., 230; *Com. v. Keeper*, 2 Ashm., 227; *Com. v. Parker*, 9 Met., 263, 265; but see *Smith v. State*, 3 Redding, 48.

killed, the person so offending shall be deemed guilty of murder and punished accordingly.”¹

STATEMENT OF THE OFFENSE OF MURDER BY DISPLACING A SWITCH.

(Commence as in the form on page 35) that C. D., on, etc., at, etc., in said county, did willfully, maliciously and feloniously displace a certain switch of a certain railroad called (*insert the name of the railroad*), with intent that a person, *to wit.*, one E. F., then and there bring, and passing on and over the said railroad, should be unlawfully and feloniously injured thereby; and that afterwards, *to wit.*, on the — day of —, A. D. 18—, at the town of — in the said county, in consequence of displacing the said switch as aforesaid, with the intent aforesaid, the said E. F. was at the time and place last above mentioned unlawfully and feloniously, with malice aforethought, killed and murdered; whereby the said C. D. did at the time and place last above mentioned unlawfully, willfully and feloniously, with malice aforethought, kill and murder the said E. F., being at the time and place last above mentioned in the peace of the people, contrary to the form of the statute in such case made and provided (*conclude as in the form on page 35*).

§ 368. Murder by an Accessory.—An accessory is considered by our law as principal, and may be punished accordingly.¹

STATEMENT OF THE OFFENSE OF MURDER BY AN ACCESSORY.

(Commence as in the form on page 35) that one E. F., on, etc., at, etc., in the said county, did unlawfully, feloniously and willfully, with malice aforethought, assault G. H. in the peace of the people then and there being, and give him several mortal wounds with a stick then and there held in his right hand, on the left side of his head, of which said mortal wounds the said G. H. then and there instantly died (*or “languished a short time and then, on the — day of —, A. D. 18 —, and there died”*); and that C. D. was then and there present unlawfully, feloniously and willfully, with malice aforethought, aiding, abetting and assisting the said E. F. in the said murder (*conclude as in the form on page 35*).

2. MANSLAUGHTER.

§ 369. Provisions of the Statute—Manslaughter Defined.—“Manslaughter is the unlawful killing of a human being without

¹ R. S., 379, § 186.

² R. S., 393, § 274; *State v. Brown*, 25 Iowa, 561; *State v. Thornton*, 26 Iowa, 80; *Van Meter v. People*, 60 Ills., 169.

malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible or involuntary in the commission of an unlawful act, or a lawful act without due caution or circumspection.”¹

§ 370. **Voluntary.** — “In cases of voluntary manslaughter, there must be a serious and highly provoking injury, inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed, to commit a serious personal injury on the person killing. The killing must be the result of the sudden, violent impulse of passion, supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given and the killing sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as murder.”²

§ 371. **Involuntary.** — “Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner: *Provided, always*, that where such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder.”³

§ 372. **Punishment.** — “Whoever is guilty of manslaughter shall be imprisoned in the penitentiary for his natural life, or for any number of years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict; upon a plea of guilty, the punishment shall be fixed by the court.”⁴

¹ R. S., 374, § 143. This definition is the same as at common law. *State v. Shelledy*, 8 Iowa, 478.

² R. S., 374, § 144.

³ *Id.*, § 145.

⁴ *Id.*, § 146.

STATEMENT OF THE OFFENSE OF MANSLAUGHTER.¹

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, unlawfully, feloniously and willfully did cast and throw a certain stone, then and there held in his right hand, and then and there unlawfully, feloniously and willfully did thereby strike, penetrate and wound E. F., then and there being in the peace of the people, thereby giving the said E. F. then and there a mortal wound, in and upon the right side of the head, near the right temple of the said E. F., of which said mortal wound the said E. F. then and there instantly died (or "*languished a short time and then, on the — day of —, A. D. 18—, and there died*").

And so the said A. B. on his oath says, that C. D., in the manner and by means aforesaid, unlawfully, feloniously and willfully did kill the said E. F., against the peace and dignity of the people of the state of Illinois (conclude as in form on page 35).

§ 373. Evidence. — The evidence in case of manslaughter is substantially the same as in murder, except that in case of manslaughter no malice must exist or is required to be proved, for it is the want of malice and deliberation which reduces the crime of murder to manslaughter.²

§ 374. Cases Collected Illustrating the Difference between Murder and Manslaughter. — The statutes have stated the difference between murder and manslaughter as clearly as it can be stated in words. Yet the distinction may be illustrated and made somewhat clearer by a reference to some of the cases. Where the deceased took hold of the bridle-reins of a horse on which the prisoner was mounted, and held him for thirty or forty minutes, and the prisoner at the end of that time struck the deceased with a jug of molasses which he happened to have in his hand, and thereby killed him, the offense was held to be manslaughter and not murder.³ If one under the color or claim of authority unlawfully arrest, or actually attempt or offer to arrest, another, and the latter in his resistance kills

¹ Strike out the words "malice aforethought" and the word "murder" in the statement of the offense of murder, then such statement will be a sufficient statement of the offense of manslaughter. For a form of an indictment for manslaughter held not to be good, see *State v. McBride*, 26 Wis., 409.

² 1 Arch. C. P. & Pl., 806.

³ *State v. Ramsey*, 5 Jones N. C., 195.

the aggressor, the offense will be manslaughter.¹ A person is guilty of manslaughter if, when he is assaulted with a fist, he instantly stabs to death the assailant,² or if after requesting another to leave his house he ejects him with a kick³ or resorts to any other violent battery,⁴ when gentler measures will do, and thereby kills him, or if he intentionally takes the life of another in the defense of his property other than his dwelling-house,⁵ or if he finds another in the act of adultery with his wife, and in the first transport of passion kills him.⁶

§ 375. Unintentional Killing in Doing an Unlawful Act. — The killing of a human being without any intent to do so in the commission of an unlawful act is manslaughter.⁷ As where a man found a trespasser upon his land, caught him, and in beating him accidentally killed him, without intending to do so, it was held to be manslaughter.⁸ And so where a man is engaged in unlawful and dangerous sport,⁹ or shoots at the poultry of another without intending to steal it,¹⁰ or throws a stone at another wantonly and in play merely,¹¹ and accidentally kills another, the offense is manslaughter.

§ 376. Continued — Illustrations — Negligence. — The involuntary killing of another in doing a lawful act, which probably might produce such consequence in an unlawful manner, is

¹ *Com. v. Drew*, 4 Mass., 391; *Rex v. Deleany*, Jebb, 88; *Reg. v. Tooley*, 11 Mod., 242; *Roberts v. State*, 14 Mo., 138; *Rex v. Gordon*, 1 East P. C., 315; 2 *Wheeler C. C.*, 495.

² *Stewart v. State*, 1 Ohio S., 66, 71; *State v. Yarborough*, 1 Hawks, 78; *State v. Tackett*, 1 Hawks, 210; *State v. Kennedy*, 20 Iowa, 569; *State v. Neeley*, 20 Iowa, 569.

³ *Wild's Case*, 2 Lewin, 214; *McCoy v. State*, 3 Engl., 451.

Rex v. Longden, Russ. & Ry., 228; *Reg. v. Sullivan*, C. & M., 209; *State v. Lazarus*, 1 Mills, 34; *McCoy v. State*, 3 Engl., 451.

⁶ *U. S. v. Wiltburger*, 3 Wash. C. C., 515.

State v. Samuels, 3 Jones L. N. C., 74; *People v. Ryan*, 2 *Wheeler C. C.*, 54.

⁷ R. S., 374, § 145; but see *Rowan v. State*, 30 Wis., 129.

⁸ *Foster*, 291; 1 *Hale*, 473; 1 *East P. C. C.*, 5, § 32.

⁹ 1 *East Cr. L.*, 279.

¹⁰ *Foster*, 258, 259; 1 *Arch. C. P. & Pl.*, 764.

¹¹ 1 *Hawks*, 29, § 9.

manslaughter.¹ As where a merchant in raising a cask of wine to a third story over a crowded street, without sufficiently guarding the method of raising the cask, let it slip and thereby killed two women, it was held to be manslaughter.² So driving with loose reins on a frequented road, whereby death ensues, has been held to be manslaughter.³ So it has been held that it is manslaughter if one discharges a gun in the dark and kills one whom he did not see.⁴ The offense, where correction is inflicted with an instrument not deadly, but improper for correction, or with a proper instrument to an improper degree, whereby death unexpectedly ensues, is manslaughter.⁵ And so where an engineer left the engine in charge of an incompetent person,⁶ where a pilot failed to make himself understood by a foreign helmsman,⁷ where the proper signal was neglected by a railway tender,⁸ and where a ground bailiff neglected to ventilate a mine,⁹—in all these cases where death ensues the defendant is guilty of manslaughter.

¹ R. S., 374, § 145.

² *Rex v. Rigmarдон*, 1 Lewin, 180.

³ *Rex v. Dalloway*, 2 Cox C. C., 273; *Rex v. Murray*, 5 Cox C. C., 352; *Rex v. Haines*, 2 Car. & K., 368.

⁴ *People v. Fuller*, 2 Park. Cr. R., 16.

⁵ *Rex v. Cheeseman*, 7 Car. & P., 455; *Anonymous*, 1 East P. C., 261; 1 Hawks P. C., 85, § 5.

⁶ *Rex v. Hogan*, 5 Eng. Law. & Eq., 553.

⁷ *Rex v. Spence*, 1 Cox, 352; but see *Rex v. Allen*, 7 Car. & P., 153; *Rex v. Greene*, 7 Car. & P., 156.

⁸ *Rex v. Pargeter*, 3 Cox, 191.

⁹ *Rex v. Haines*, 2 Car. & K., 368.

SECTION III.

OFFENSES AGAINST PERSONS.

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1. ABORTION

§ 377. The Common Law as to Abortions. — At common law it was no offense to perform an operation upon a pregnant woman by her consent, for the purpose of procuring an abortion and thereby succeed in the intention unless the woman was “quick with child.” If, before the mother had become

sensible to its motion, it was not a crime,¹ if afterwards, when it was considered by the common law that the child had a separate and independent existence, it was held to be highly criminal² and was a misdemeanor.³

§ 378. **Provisions of the Statute as to Procuring Abortions.** — Our statute provides that “ whoever, by means of any instrument, medicine, drug or other means whatever, causes any woman, pregnant with child, to abort or miscarry, or attempts to procure or produce an abortion⁴ or miscarriage,⁵ unless the same were done as necessary for the preservation of the mother’s life, shall be imprisoned in the penitentiary not less than one nor more than ten years; or if the death of the mother results therefrom, the person procuring or causing the abortion or miscarriage shall be guilty of murder.”⁶

379. **Ecbolic or Abortifacient Drugs.** — “ If any druggist, dealer in medicine, or other person, sells to any person any drug or medicine, known or presumed to be ecbolic or abortifacient, except upon the written prescription of some well known and respectable practicing physician, or keeps on hand, or advertises or exposes for sale, or sells any pills, powders, drugs or combination of drugs designed especially for the use of females, without keeping a certificate as required in the

¹ *Com. v. Parker*, 9 Met., 263; *State v. Cooper*, Zab., 53; *Smith v. State*, 33 Me., 48; *Com. v. Bangs*, 9 Mass., 387; *Abrams v. Foshee*, 3 Iowa, 274; *contra*, 1 Whart. Cr. L., § 1220; *Lewis Cr. L.*, 12; *Mills v. Com.*, 1 Harris, 631.

² *Id.*

³ *Halliday v. People*, 4 Gilm., 111; 3 Chitty Cr. L., 798; *Roscoe Cr. Ev.*, 266; 1 Black. Com., 129.

⁴ The word “ abortion ” is defined to be the premature exclusion of the human fœtus after the period of quickening. 1 Russ. on Cr., 671; 1 Chitty Gen. Pr., 35; 2 Arch. C. P. & Pl., 96.

⁵ The expulsion of the ovium or embryo within the first six weeks after conception is technically a miscarriage. Chitty Med. Juris., 410; *Smith v. State*, 33 Me., 48. But the criminal attempt to destroy the fœtus at any time before birth is termed in law a miscarriage. *Id.*; but see *People v. Lohman*, 2 Barb., 216; 1 Com., 379; *People v. Stockhame*, 1 Park. Cr. R., 424.

⁶ R. S., 352, § 3; *State v. McBride*, 26 Wis., 409. The defendant may be tried in the county wherein the medicine intended to produce the miscarriage was administered, and not in that where the miscarriage took place. *State v. Hollenback*, 36 Iowa, 112.

next succeeding section, he shall for each offense be fined not less than fifty dollars nor more than five hundred dollars, or be confined in the county jail not less than thirty days nor more than six months, or both: *Provided*, this section shall not be construed to apply to compounds known as 'official.'"¹

§ 380. **Certificate Required.**—“Before any pills, powders, drugs or combination of drugs designed expressly for the use of females, shall be kept or exposed for sale or sold, the proprietor thereof shall submit under oath a true statement of the formula by which the same is compounded, to five well-known and respectable practicing physicians, in the county where the same is proposed to be sold, and shall procure their certificate signed and verified by the affidavit of each of them, that such combination is not abortifacient; and every person keeping on hand, or in any manner advertising or exposing for sale or selling such combination, shall keep such certificate, or a sworn copy thereof, with the formula attached, for the inspection of any person desiring to see the same.”²

§ 381. **Advertising Abortifacient Drugs.**—“Whoever advertises, prints, publishes, distributes or circulates, or causes to be advertised, printed, published, distributed or circulated, any pamphlet, printed paper, book, newspaper notice, advertisement or reference, containing words or language giving or conveying any notice, hint or reference to any person, or to the name of any person, real or fictitious, from whom, or to any place, house, shop or office where any poison, drug, mixture, preparation, medicine or noxious thing, or any instrument or means whatever, or any advice, information, direction or knowledge may be obtained for the purpose of causing or procuring the miscarriage of any woman pregnant with child, shall be punished by imprisonment not exceeding three years, or fine not exceeding one thousand dollars.”³

¹ R. S., 352, § 4.

² Id., § 5.

³ Id., 353, § 6.

STATEMENT OF THE OFFENSE OF PRODUCING A MISCARRIAGE.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, did unlawfully and feloniously administer to one G. H., then and there bring a woman pregnant with child, a certain noxious¹ substance called savin, with intent, then and there to produce the miscarriage of the said G. H., and then and there did thereby unlawfully and feloniously cause the miscarriage of the said G. H., it not being then and there necessary to cause such miscarriage for the preservation of the life of the said G. H.;² the said C. D. then and there well knowing that the said noxious substance would produce such miscarriage, contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

STATEMENT OF THE OFFENSE OF ATTEMPTING TO PRODUCE MISCARRIAGE.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, did unlawfully, feloniously and willfully use and employ a certain instrument³ called a forceps in and upon one G. H., then and there being a woman pregnant with child, and then and there did thereby unlawfully, feloniously and willfully attempt to procure and produce the miscarriage of the said G. H., it not being necessary to procure or produce such miscarriage for the preservation of the life of the said G. H.,⁴ contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

§ 382. Evidence Required — 1. It Must be Proved that the Defendant applied an Instrument or Administered Medicine, Drug or other Noxious Thing to the Woman.⁵ — To constitute an administering or causing to be taken, it is not necessary that the delivery should be by the hand of the defendant. It is sufficient if the defendant mixes the substance and tells the woman that it is for her,⁶ or delivers it to her with intent to

¹ The name of the medicine need not be stated, nor need it be described as noxious. *State v. Vawter*, 7 Blackf., 922.

² This negative averment is probably necessary. *Metzger v. People*, 14 Ills., 101; 7 Blackf., 592; *State v. Abbott*, 11 Foster N. H., 434; *State v. Godfrey*, 24 Me., 234.

³ The words "a certain instrument, the name of which is to the jurors unknown," were held to be a sufficient description of the instrument, *Com. v. Snow*, 116 Mass., 47.

⁴ It is not necessary to allege that the woman did not die. *Com. v. Thompson*, 108 Mass., 461.

⁵ R. S., 352, § 3; 2 Arch. C. P. & Pl., 101.

⁶ *Rex v. Harley*, 4 Car. & P., 369; *Rex v. Cadman*, R. & M. C. C., 114.

cause an abortion or miscarriage, and the pregnant woman takes it in his presence or absence and it causes her to abort or miscarry.¹ It is not necessary to prove that "the child was quick" to convict the defendant of producing a miscarriage.² It has been held that the defendant may be guilty of an attempt to procure a miscarriage, though the evidence showed affirmatively that the woman supposed to be pregnant was not so in fact.³

§ 383. 2. It Must be Proved that the Instrument, Medicine, Drug or other Noxious Substance named in the Indictment would Cause a Woman Pregnant with Child to Abort or Miscarry.⁴— This may be proved by the defendant's admissions or otherwise.⁵ Where the noxious substance was called in the indictment "a decoction of a certain shrub called savin" (which is produced by boiling the leaves), and the evidence was of an infusion (which is produced by pouring boiling water on the leaves of the shrub), the variance was held to be immaterial as they were of the same nature.⁶ It has been intimated that a person may be convicted of an attempt to procure a miscarriage though the thing administered was not capable of producing it, if such person supposed it would.⁷ And it is admissible to prove that ergot, a drug shown to have been administered to the pregnant woman, was popularly supposed to produce abortion, the object being to prove an attempt to procure an abortion.⁸ The fact of the secretion of the fœtus about the building where the offense is alleged to have been committed is admissible in evidence as tending to prove the *corpus delicti*.⁹

¹ Reg. v. Wilson, 3 Eng. Law & Eq. R., 605.

² People v. Jackson, 3 Hill, 92; State v. Howard, 32 Vt., 380.

³ Reg. v. Goodhall, 1 Den. C. C., 187, 2 Cox. C. C., 40; 2 Car. & K., 293; but see Rex v. Scudder, 1 Moody, 216; Rex v. Goldsmith, 3 Camp., 76; Rex v. Phillips, 3 Camp., 73.

⁴ R. S., 352, § 3; 2 Arch. C. P. & Pl., 102

⁵ 2 Arch. C. P. & Pl., 102.

⁶ Rex v. Phillips, 3 Camp., 74.

⁷ Rex v. Coe, 6 Car. & P., 403; Rex v. Phillips, 3 Camp., 74.

⁸ Carter v. State, 2 Carter, 617.

⁹ State v. Howard, 32 Vt., 380, 405.

2. ABDUCTION.

§ 384. Provisions of the Statute Relating to the Abduction of a Female. — “Whoever entices or takes away any unmarried female of a chaste life and conversation from the parents’ house, or wherever she may be found, for the purpose of prostitution or concubinage, and whoever aids and assists in such abduction for such purpose, shall be imprisoned in the penitentiary not less than one nor more than ten years.”¹

STATEMENT OF THE OFFENSE OF ABDUCTION OF A FEMALE.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, did unlawfully and feloniously entice and take away one E. F., then and there being an unmarried female, of a chaste life and conversation from her parents’ house, for the purpose of prostitution, contrary to the form of the statute in such case made and provided² (conclude as in form on page 35).

§ 385. Evidence. — If the female leaves her home voluntarily, without being enticed, aided or assisted by the defendant, and cohabits with him, he is not guilty of her abduction, though it would be otherwise if he had purposely enticed her to leave.³ The words “of a chaste life and conversation” in the statute mean actual and personal virtue in the female, and to sustain an indictment it is necessary that she should have been chaste and pure in conduct and principle up to the time of the commission of the offense or the commencement of acts on the part of the accused which resulted in the abduction of the female.⁴ Under the Massachusetts statute it was held that the statute did not apply to a case of a man’s enticing a woman to leave

¹ R. S., 352, § 1.

² Since the abduction of a female for the purpose of prostitution was not an indictable offense at common law, *Carpenter v. People*, 8 Barb., 603, the conclusion should be against the form of the statute, etc. It seems, however, that a conspiracy for such purpose was indictable at common law. *Rex v. Grey*, 3 St. Tr., 519; 1 East P. C., 11, § 10.

³ *Carpenter v. People*, 8 Barb., 603.

⁴ Id. In Iowa it has been held that an unmarried female who had become unchaste by sexual intercourse, might reform and gain a character for chastity within the meaning of the statute. *State v. Canon*, 18 Iowa, 372.

her abode for the purpose of illicit sexual intercourse with him;¹ but the insertion of the word "concubinage" in our statute² would make it apply to such a case. The previously chaste character of the female is presumed, and the onus is upon the defendant to show to the contrary,³ and if she has been examined to show that she was enticed from home and seduced, she may be cross-examined as to her chastity, etc.⁴ Where acts of lewdness and immodesty on the part of the female were shown, it was held proper for the people to rebut this evidence by testimony showing that she was a young woman of good character for chastity, of correct and modest deportment, and that until the occurrence with the defendant was considered a virtuous girl.⁵

§ 386. Provisions of the Statute Relating to the Abduction of a Child. — "Whoever unlawfully takes or decoys away any child under the age of twelve years, with intent to detain or conceal such child from its parents, guardian or other person having the lawful charge of such child, shall be confined in the county jail not exceeding one year, or fined not exceeding two thousand dollars, or both, in the discretion of the court: *Provided*, this section shall not apply to any one who in good faith interferes to protect the child from abuse or cruel treatment."⁶

STATEMENT OF THE OFFENSE OF ABDUCTION OF CHILD.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in said county, did unlawfully take and decoy E. F., then and there being a child under the age of twelve years, with intent then and there unlawfully to detain and conceal such child from its parents, then and there having lawful charge of the said E. F., contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

¹ *Com. v. Cook*, 12 Met., 93; and see *Carpenter v. People*, 8 Barb., 613; *State v. Ruhl*, 8 Iowa, 449.

² R. S., 352, § 1.

³ *Andre v. State*, 5 Iowa, 396; *State v. Sutherland*, 30 Iowa, 570; *State v. Higdon*, 32 Iowa, 262.

⁴ *State v. Sutherland*, 30 Iowa, 570.

⁵ *State v. Shean*, 32 Iowa, 88.

⁶ R. S., 352, § 2.

3. ASSAULT WITH INTENT TO COMMIT A FELONY.

§ 387. Provisions of the Statute. — "An assault with an intent to commit murder, rape, mayhem, robbery, larceny, or other felony, shall subject the offender to imprisonment in the penitentiary for a term not less than one year nor more than fourteen years."¹

§ 388. Continued — With Intent to Murder. — "Whoever attempts to commit murder by poisoning, drowning, strangling or suffocating another, or by any means, shall be guilty of the crime of assault with intent to murder, and punished accordingly."²

STATEMENT OF THE OFFENSE OF AN ASSAULT WITH INTENT TO MURDER.³

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, with a drawn sword which the said C. D. then and there held in his right hand, did unlawfully make an assault⁴ upon one E. F.,⁵ in the peace of the people, then and there being with an intent,⁶ then and there

¹ R. S., 355, § 23.

² Id., § 24.

³ For a form of indictment, see *McKinney v. State*, 25 Wis., 378.

⁴ It is not necessary to allege the commission of the act constituting the assault, nor to state the instrument or means used by the assailant nor the manner of making the assault. *Conolly v. People*, 3 Scam., 474; *State v. Dent*, 3 Gill & J., 8; *State v. Chandler*, 24 Mo., 371; *Bloomer v. State*, 3 Sneed, 66; *People v. Pettit*, 1 John., 511; *U. S. v. Herbert*, 5 Cranch C. C., 87; *contra*, *Beasley v. State*, 18 Ala., 535; *Trexler v. State*, 19 Ala., 21; *State v. Johnson*, 11 Texas, 22; *Jennings v. State*, 9 Mo., 852; *State v. Johnson* 19 Mo., 213.

⁵ The name of the person assaulted and intended to be killed must be stated if known. *State v. Patrick*, 3 Wis., 812; *Vandermark v. People*, 47 Ills., 122; *Jones v. State*, 11 Sm. & M., 315; *contra*, *State v. Emegh*, 18 Iowa, 123; but where the person is described by the initials of his Christian name and is as well known by such initials as by his full name, which is a question for the jury to determine, a conviction will be sustained. *Vandermark v. People*, 47 Ills., 122.

⁶ The words "with intent in and upon the said E. F., then and there feloniously, willfully, and of his malice aforethought, to commit murder," have been held sufficient to describe the intent. *Curtis v. People*, Breese, 197, 2nd Ed., 256; *State v. Williams*, 3 Foster, 321; *McCoy v. State*, 3 Engl., 451.

unlawfully,¹ willfully and feloniously, with malice aforethought,² to kill and murder the said E. F. (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF AN ASSAULT WITH INTENT TO COMMIT
A RAPE.

(*Commence as in form on page 35*) that C. D. on, etc., at, etc., in the said county, did unlawfully make an assault upon A. B., then and there being a female, with intent³ then and there feloniously⁴ and forcibly to ravish, and carnally know the said A. B. against her will⁵ (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF AN ASSAULT WITH INTENT TO ROB.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, did unlawfully and violently make an assault upon one E. F. with intent⁶ then and there, feloniously and violently,⁷ by force (*or "intimidation"*) to rob, steal, take and carry away the money of the said A. B. of the value of ten dollars, from the person and against the will of the said A. B., (*conclude as in form on page 35*).

¹ The word "unlawfully" may be omitted. *Fairlee v. People*, 11 Ills., 1; *Perry v. People*, 14 Ills., 499; *State v. Williams*, 3 Foster N. H., 321; but see *Curtis v. People*, Breese, 256, 1 Scam., 285.

² The words "feloniously, with malice aforethought," are necessary. *Rice v. State*, 16 Ind., 298; *McCoy v. State*, 3 Engl., 451; *State v. Howell*, 1 Ga., 158; *State v. Wilson*, 7 Ind., 516; *State v. Free*, 19 Wis., 591; *Curtis v. People*, 1 Breese, 197, 1 Scam., 285; *contra*, *People v. Pettit*, 3 John R., 511; *Robinson v. Com.*, 16 B. Monr., 609; *State v. Newberry*, 26 Iowa, 467.

³ The word "intention" may be substituted for the word "intent." *State v. Tom*, 2 Jones N. C., 414. And it has been held that the word "attempt" may be substituted for the statute word "intent." *Johnson v. State*, 14 Ga., 55; *contra*, *State v. Ross*, 25 Mo., 426; *State v. Marshall*, 14 Ala., 411; *Nugent v. State*, 19 Ala., 540.

⁴ The word "feloniously" is indispensable. *Curtis v. People*, 1 Scam., 285; *Mears v. Com.*, 2 Grant Pa., 385.

⁵ As to a variance in the name of the female, see *State v. Emeigh*, 18 Iowa, 123.

⁶ The words "against her will" should not be omitted. *Mears v. Com.*, 2 Grant Pa., 385; see also *Nugent v. State*, 19 Ala., 54. An indictment which alleged an assault with intent to carnally know and ravish by force against her will a child under ten years of age was held good. *Fizell v. State*, 25 Wis., 364.

⁷ The word "violently" is essential. 2 Leach, 702; 1 East P. C., 420, 421; but see *State v. Nichols*, 8 Conn., 496.

⁸ The allegation of an intent to rob is indispensable. *Conolly v. People*, 3 Scam., 474; *State v. Hailstock*, 2 Blackf., 257; but the allegation "with intent then and there, willfully, unlawfully and feloniously to commit a

STATEMENT OF THE OFFENSE OF AN ASSAULT WITH INTENT TO
COMMIT LARCENY.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, did unlawfully make an assault upon E. F., with intent¹ then and there, feloniously to steal, take and carry away the goods and chattels of the said E. F., *to wit.*, one gold watch of the value of one hundred dollars, (conclude as in form on page 35).

§ 389. 1. Evidence — An Assault Must be Proved.²— Under our statute an assault cannot be committed unless there is a present ability to commit a violent injury.³ Therefore a man with a gun containing nothing but powder and a cotton wad (though he believes that it contains a bullet) cannot commit an assault with intent to do murder on a man forty feet distant, by shooting at him with a gun so loaded.⁴ Yet if he levels a gun at another and shoots, the presumption is that it was loaded with powder and ball.⁵ An assault with intent to kill may be committed without an actual striking or wounding,⁶ or doing any personal injury.⁷

§ 390. 2. The Intent Must be Proved as Alleged.⁸— If the as-

robbery of goods and chattels from the person of the said A. B.," was held a sufficient statement of the intent, where no objection was taken before pleading. *Id.* So the words "with an intent," the moneys, goods and chattels of the said E. F., from the person and against the will of the said E. F., then and there, feloniously and violently to rob, steal, take and carry away, against the form of the statute in such case made and provided, were held a sufficient statement of the intent. *Reg. v. Huxley, C. & M.*, 596.

¹ The words "with intent to steal from the pocket" without stating the goods or moneys intended to be stolen, were held sufficient. *Com. v. Rogers*, 5 Serg. & R., 463; *Com. v. McDonald*, 5 Cush., 363.

² *State v. Jefferson*, 3 Harring., 571; *Morgan v. State*, 13 Sm. & M., 342; *Morman v. State*, 24 Missis., 54; *Penn. v. McBirnie, Add.*, 30.

³ *R. S.*, 355, § 20; *Jane's Case*, 1 Car. & K., 530; *State v. Malcom*, 8 Iowa, 413.

⁴ *State v. Swails*, 8 Ind., 524; *contra*, *State v. Shephard*, 7 Conn., 54; *Caldwell v. State*, 5 Texas, 18.

⁵ *Caldwell v. State*, 5 Texas, 18.

⁶ *State v. McClure*, 25 Mo., 29.

⁷ *State v. Myers*, 19 Iowa, 517.

⁸ *State v. Jefferson*, 3 Harring., 571; *Morgan v. State*, 13 Sm. & M., 242; *Penn. v. McBirnie, Add.*, 30; *Morman v. State*, 24 Missis., 54; *State v. Neal*, 37 Me., 468; but see *U. S. v. Thorpe*, 5 Cranch C. C., 39.

sault is alleged to have been done with intent to commit one felony, and the evidence be of an intent to commit another, though it be of the like kind, the variance is fatal.¹ Therefore, where the prisoner was charged with an assault with intent to murder, maim and disable, and the jury found that the intent was to commit robbery, and that the prisoner cut and maimed the watchman with intent to disable him till he could effect his own escape, it was held that the prisoner ought not to be convicted.² Where the intent charged was to commit a rape, evidence that the defendant, in a conversation before the alleged commission of the offense, stated upon being asked if the prosecutrix was an unchaste woman, that he did not know, "but was going over to try her, and if it was all right, would tell them," was held not to show that the thought of criminal intercourse with the prosecutrix was in the defendant's mind.³

§ 391. **What Sufficient Evidence of the Intent.** — The intent must be shown by proof of such facts and circumstances accompanying the transaction as would have constituted the offense charged to have been committed, in case the accused had succeeded in carrying his intention into full effect.⁴ Therefore if murder is charged to have been intended to be committed, the evidence must show that if death had ensued it would have been murder.⁵ If malice is not shown, the defendant cannot be convicted of an assault with intent to murder.⁶ But the presumptions as to malice are the same as on

¹ 3 Greenl. Ev., § 17; *Rex v. Jenks*, 2 Leach C. C., 774, 2 East P. C., 514; *Com. v. Shaw*, 7 Met., 52, 57.

² *Rex v. Boyce*, 1 Moody C. C., 29; *Rex v. Duffin*, Russ. & Ry., 365; *Rex v. Gillon*, 1 Moody C. C., 85.

³ *State v. Warner*, 25 Iowa, 202.

⁴ *King v. State*, 21 Ga., 220; *State v. Malcom*, 8 Iowa, 413; *State v. Parmelee*, 9 Cowen, 259; *Sharp v. State*, 19 Ohio, 379; *State v. Nichols*, 8 Conn., 496.

⁵ *McCoy v. State*, 3 Engl., 451; *State v. Neal*, 37 Me., 468; *State v. Anderson*, 2 Tenn. R., 6; *People v. Vinegar*, 2 Park. Cr. R., 24.

⁶ *Hopkinson v. People*, 18 Ills., 264; *People v. Vinegar*, 2 Park. Cr. R., 24.

the trial of an indictment for murder.¹ If a person fires a pistol with malice prepense or a total disregard of human life, he and all acting with him are guilty of an assault with intent to murder.² And if intending to murder A, and supposing B to be A, a person shoots at and wounds B, he may be convicted of an assault upon B with intent to murder him.³

§ 392. **Acquittal of the Higher Crime and Conviction of the Lesser.** — If the accusation includes an offense of an inferior degree, the accused may be acquitted of the higher crime and convicted of the lesser.⁴ Therefore on an indictment for an assault with intent to commit murder, if it is alleged that the assault was with a deadly weapon, the defendant may be convicted of an assault with a deadly weapon with intent to inflict a bodily injury,⁵ provided the jury find the facts necessary to constitute such offense.⁶ Otherwise if there is no allegation that the assault was with a deadly weapon. So if the felonious intent is not proved, the defendant may be convicted of the assault alone.⁷ There are authorities holding that on an indictment for an assault with intent to commit a felony, if the felony is proved to have been committed, the accused must be acquitted,⁸ but the better opinion is that he may be convicted

¹ *Id.*, *People v. Shaw*, 1 Park. Cr. R., 327; *Wright v. State*, 9 Yerg., 342; but see *Reg. v. Jones*, 9 Car. & K., 258.

² *Perry v. People*, 14 Ills., 496; *Vandermark v. People*, 47 Ills., 122; *State v. Myers*, 19 Iowa, 517.

³ *Rex v. Smith*, 33 Eng. L. & Eq., 567.

⁴ *Prindeville v. People*, 42 Ills., 217; *White v. People*, 32 N. Y., 469; *Carpenter v. People*, 4 Scam., 197; *People v. Jackson*, 3 Hill, 92; *Com. v. McGrath*, 115 Mass., 150; *Com. v. Dean*, 109 Mass., 349; *Dedrew v. People*, 2 N. Y., 183; *Orton v. State*, 2 Greene Iowa, 140; *State v. Cross*, 12 Iowa, 66; *Gillespie v. State*, 9 Ind., 380.

⁵ *Beckwith v. People*, 26 Ills., 503.

⁶ *Id.*; *Carpenter v. People*, 4 Scam., 197.

⁷ *State v. Bowling*, 10 Humph., 52; *Stewart v. State*, 5 Ohio, 242; *Clark v. State*, 12 Ga., 350; *Gardenhier v. State*, 6 Texas, 358; *Com. v. Cooper*, 15 Mass., 187; *McKinney v. State*, 25 Wis., 378; *State v. Felner*, 19 Wis., 561; *Dixon v. State*, 3 Iowa, 416.

⁸ *Roscoe Cr. Ev.*, 886; *Barb. Cr. L.*, 78; *Rex v. Hammond*, 1 East P. C., 411, 440; 1 Russ. on C., 681; *Com. v. Squire*, 1 Met., 258; *Com. v. Roby*, 12 Pick., 496; *Com. v. Kingsbury*, 5 Mass., 106.

of the assault with intent to commit the felony, though the proof shows that he actually committed the felony.¹ Such conviction is no bar to a subsequent prosecution for the felony.² On an indictment for a rape a party may be convicted of an assault with intent to commit a rape.³

§ 393. **Defense of Property, when no Justification.**—An assault with intent to kill cannot be justified on the ground that it was necessary for the defense of property, except of the dwelling-house of the accused.⁴

4. ASSAULT WITH A DEADLY WEAPON.

§ 394. **Provisions of the Statute.**—“An assault with a deadly weapon, instrument or other thing, with an intent to inflict upon the person of another a bodily injury, where no considerable provocation appears, or where the circumstances of the assault show an abandoned and malignant heart, shall subject the offender to a fine not exceeding one thousand dollars nor less than twenty-five dollars, or imprisonment in the county jail for a period not exceeding one year, or both, in the discretion of the court.”⁵

STATEMENT OF THE OFFENSE OF AN ASSAULT WITH A DEADLY WEAPON.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, without any considerable provocation⁶ whatever, with a deadly

¹ *Reg. v. Button*, 11 Q. B., 929, 12 Jur., 1017; *State v. Leavitt*, 32 Me., 183; *Lohman v. People*, 2 Barb., 216, 1 Com., 379; *State v. Shephard*, 7 Conn. R., 54.

² *Severin v. People*, 37 Ills., 415; *Freeland v. People*, 16 Ills., 380; *Gardiner v. People*, 20 Ills., 434; *contra*, 1 Bish. Cr. L., § 1057.

³ *Prindeville v. People*, 42 Ills., 217; *State v. Shephard*, 7 Conn., 54; *Com. v. Cooper*, 15 Mass., 187; *State v. Cross*, 12 Iowa, 66.

⁴ *State v. Morgan*, 3 Ired., 186.

⁵ R. S., § 25.

⁶ An indictment must aver that no considerable provocation appeared, or that the circumstances of the assault showed an abandoned and malignant heart. *Baker v. People*, 49 Ills., 309; *Reddan v. State*, 4 Greene Iowa, 137; see *Winfield v. State*, 3 Greene Iowa, 339.

weapon,¹ *to wit.*, with an ax,² did unlawfully, willfully and maliciously make an assault upon the said A. B., with intent then and there unlawfully, willfully and maliciously³ to inflict upon the person of the said A. B. a bodily injury, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 395. Evidence—Conviction of the Lesser Offense—Former Conviction of an Assault no Bar. — The statute points out the proof required. The offense is only an assault and battery of an aggravated character,⁴ and the same rule of evidence applies as in other cases of assault and battery. The previous threats of the prisoner are admissible in proof.⁵ Where a party holds a deadly weapon in one of his hands and makes an assault upon another with the other, but does not use or threaten to use the deadly weapon, he is only guilty of an ordinary assault and not of an assault with a deadly weapon with intent to inflict bodily injury.⁶ If there is no evidence that the assault was with a deadly weapon, or of the intent to inflict a bodily injury, the defendant may be convicted of the lesser offense of assault.⁷ And a conviction of an assault and battery will not bar a prosecution for an assault with a deadly weapon on the same transaction.⁸ An assault with intent to commit bodily

¹ In Iowa, where the indictment alleged the assault to have been committed with a "deadly weapon" in the language of the statute, it was held to be a sufficient description of the instrument. *State v. Seamons*, 1 Greene Iowa, 418.

² An assault with an ax or a chisel will be considered an assault with a deadly weapon without being so alleged. *Dollarhide v. U. S.*, 1 Morris, 233; *State v. Ostrander*, 18 Iowa, 437; *Com. v. Brauham*, 8 Bush. Ky., 387. Where the offense is charged to have been committed with several deadly weapons it is only necessary to prove the use of one to convict the defendant. *State v. McClintock*, 1 Greene Iowa, 392.

³ The offense is only a misdemeanor, and therefore the word "feloniously" should not be used in stating the intent. *U. S. v. Gallagher*, 2 Paine, 447.

⁴ *Cokley v. State*, 4 Iowa, 477.

⁵ *Sharp v. People*, 29 Ills., 464.

⁶ *Tarpley v. People*, 42 Ills., 340.

⁷ *Beckwith v. People*, 26 Ills., 500; *Carpenter v. People*, 4 Scam., 197; *Gillespie v. State*, 9 Ind., 380; *Foley v. State*, 9 Ind., 363; *Brantley v. State*, 13 Sm. & M., 468; *Reg. v. Nichols*, 9 Car. & P., 267; *Orton v. State*, 2 Greene Iowa, 140; *State v. Shephard*, 10 Iowa, 126.

⁸ *Severin v. People*, 37 Ills., 414; *Freeland v. People*, 16 Ills., 380.

injury is not justified by a "considerable provocation" if the circumstances show "an abandoned and malignant heart."¹

5. CONCEALING DEATH OF BASTARD.

§ 396. **Provisions of the Statute.** — "If any woman shall endeavor, privately, either by herself or by procurement of others, to conceal the death of any issue of her body, which if born alive would be a bastard, so that it may not come to light, whether it shall have been murdered or not, she shall suffer confinement in the county jail for a term not exceeding one year: *Provided*, however, that nothing herein contained shall be so construed as to prevent such mother from being indicted and punished for the murder of such bastard child."²

STATEMENT OF THE OFFENSE OF CONCEALING BASTARD.

¹ (*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, then and there being a single woman, did unlawfully endeavor, privately to conceal the death of the issue of her body, then and there being an unnamed³ male child, which said child was then dead, and if it had been born alive would have been a bastard, so that it might not come to light, whether it had been murdered or not, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 397. **Evidence.** — Prove: 1. That the accused was a single woman and pregnant with a child, or if a married woman, that

¹ Winfield v. State, 3 Greene Iowa, 339.

² R. S., 358, § 44.

³ Possibly necessary. Roscoe Cr. Ev., 387; Reg. v. Hicks, 2 Moody & Ry., 502.

⁴ An indictment must show that the child was dead. Perkins' Case, 1 Lewin C. C., 44; Douglas v. Com., 8 Watts, 535; but it need not state nor be proved whether the child died before, at or after its birth; Id.; Rex v. Coxhead, 1 Car. & K., 623; where an indictment charged that the defendant afterwards, etc., "the said infant having on the day and year aforesaid died, did endeavor privately to conceal the death of the said infant," it was held that this was a sufficient averment of the death of the child. Boyles v. Com., 2 Serg. & R., 50. It is not necessary to set forth in what manner or by what acts the mother endeavored to conceal the death. Id.; State v. McKee, Add., 2.

she was pregnant by an adulterous intercourse,¹ and the non-access of the husband, for if the woman cohabited with her husband the child will be conclusively presumed to be legitimate, unless the husband was impotent.² 2. That the child was dead, and the issue of her body, and whether a male or female. 3. That she endeavored privately to conceal its death by a secret burial or otherwise. It is immaterial whether the child was dead or alive when born,³ and the woman may be convicted though the death was probably known to an accomplice.⁴ So the woman may be convicted whether the body of the child was buried or otherwise concealed by an accomplice who acted as her agent in the matter.⁵ Private burying is pointed out as evidence. But as the concealment of the death may be occasioned by accident without any design unless there be a concealment of pregnancy, labor, etc., or some other circumstances of concealment, there being no person present at the birth is not sufficient to convict the mother.⁶

§ 398. **Who may be Convicted of Concealing, etc.** — A person other than the mother of a bastard child cannot be convicted of the offense of concealing the death of such child,⁷ unless upon an indictment which charges the mother of the bastard also with the offense. Such person may, however, upon proper proof, be convicted as an accessory of aiding, assisting, abetting, counseling, commanding or procuring the commission of such offense.⁸

¹ *State v. Pettaway*, 3 Hawks, 623; 2 Arch. C. P. & Pl., 117.

² 1 Greenl. Ev., § 28.

³ *Rex v. Coxhead*, 1 Car. & K., 623; *Perkin's Case*, 1 Lewin C. C., 44; *contra*, *State v. Love*, 1 Bay, 167; *State v. Joiner*, 4 Hawks, 350; *Com. v. Clark*, 2 Ashm., 105.

⁴ *Rex v. Cornwall*, Russ. & Ry., 336; *contra*, *Peat's Case*, 1 East P. C., 5, § 15, 129.

⁵ *Douglas's Case*, 1 Moody C. C., 480, 7 Car. & P., 644; *Rex v. Bird*, 2 Car. & K., 817.

⁶ *Penn v. McKee*, Add., 1.

⁷ *Roscoe Cr. Ev.*, 387; *Reg. v. Wright*, 9 Car. & P., 754.

⁸ *State v. Sprague*, 4 R. I., 257; *Rex v. Bird*, 2 Car. & K., 817.

6. CRIMINAL CARELESSNESS.

§ 399. **What Constitutes.** — Gross carelessness which results in an injury to others is criminal independent of the statutes; and with certain limits supplies the place of a direct criminal intent.¹ As where a person by gross negligence in doing a lawful or an unlawful act causes the death of another, he is guilty of either murder or manslaughter, as the case may be.² If a man being on a horse which he knows to be accustomed to kick, willfully rides him amongst a crowd of persons, and the horse kicks a man and kills him, the rider is guilty of murder, although he had no malice against any particular person, nor any other intention than that of diverting himself by frightening the persons around him.³ So if one having an animal which he knows is dangerous, permits him to go at large and he kills a man, the owner is indictable.⁴ And if a person sets fire to an out-house, so near a dwelling-house as to endanger the latter, and it is burned, this act is deemed in law to be a burning of the dwelling-house.⁵

§ 400. **Of a Physician.** — If a person, whether a licensed practitioner or not, holds himself out as a physician, or pretends to be competent to treat diseases and to deal with the life or health of others, causes the death of another by his gross⁶ ignorance, carelessness or negligence, he is guilty of manslaughter, even though he might not have intended bodily harm to his patient,⁷ or if the injury falls short of the de-

¹ *Sturges v. Maitland*, Anthon, 153; *Com. v. Rodes*, 6 B. Monr., 171.

² 1 Bish. Cr. L., § 314; *Rex v. Carr*, 8 Car. & P., 163; *Rex v. Edwards*, 8 Car. & P., 611; *Ann v. State*, 11 Humph., 159; *U. S. v. Freeman*, 4 Mason, 505.

³ 1 Hawks P. C., 31, § 68.

⁴ 1 Bish. Cr. L., § 318; 1 East P. C., 265; *Stumps v. Kelley*, 22 Ills., 140, 142.

⁵ *Gage v. Shelton*, 3 Rich., 242.

⁶ *Rex v. Long*, 4 Car. & P., 398; *Rex v. Van Butchell*, 3 Car. & P., 629; *Rex v. Williamson*, 3 Car. & P., 635.

⁷ *Rex v. Spiller*, 5 Car. & P., 333; *Rex v. Simpson*, 1 Lewin, 172; *Rice v. State*, 8 Mo., 561; *R. v. Senior*, 1 Moody C. C., 346; *Fairlee v. People*, 11 Ills., 1.

privation of life, he may be punished for a misdemeanor.¹ But if he acts in good faith, with a reasonable degree of skill, and adopts the treatment he deems best, he is not criminally liable, though the treatment should be erroneous in the eyes of those who assume to know what treatment should be adopted, and though he is called by those who deem themselves wise, grossly ignorant of medicine and surgery.² An ignorant person stands in a different position if a volunteer when professional attendance could be had elsewhere than he would if forced to act because no other assistance could be obtained.³

§ 401. Of a Common Carrier. — The statute provides that “whoever having personal management or control of, over any steamboat,⁴ or other public conveyance used for the common carriage of persons, is guilty of gross carelessness or neglect in, or in relation to, the conduct, management or control of such steamboat or other public conveyance while being so used for the common carriage of persons, whereby the safety of any person shall be endangered, shall be imprisoned in the penitentiary not exceeding three years, or fined not exceeding five thousand dollars.”⁵

STATEMENT OF THE OFFENSE OF CRIMINAL CARELESSNESS OF A MAN-
AGER OF A STEAMBOAT.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, then and there having the personal management and control of and over a certain steamboat called —, then and there used for the common carriage of persons, was guilty of gross carelessness in the conduct, management, and control of the said steamboat while then and there being used for the common carriage of persons, by then and there (*insert a statement*

¹ R. v. Grovenvelt, 1 Ld. Raym., 213; Rex v. Long, 4 Car. & P., 405.

² Com. v. Thompson, 6 Mass., 134; Rice v. State, 8 Mo., 561; Holmes v. State, 23 Ala., 17.

³ 1 Whart. Cr. L., § 1015; R. v. Webb, 2 Lewin C. C., 196.

⁴ At common law if a person in command of a steamboat by negligence or carelessness unintentionally ran down a boat, etc., and the person in it was thereby drowned, he was guilty of manslaughter. Rex v. Green, 7 Car. & P., 156; Rex v. Allen, 7 Car. & P., 153; Reg. v. Taylor, 9 Car., 672.

⁵ R. S., 359, § 49.

of the particular acts of carelessness), whereby the safety of E. F., G. H., and the said A. B., was then and there endangered, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

7. CRUELTY TO CHILDREN AND OTHERS.

§ 402. Provisions of the Statute, — “Any person who shall willfully and unnecessarily expose to the inclemency of the weather, or shall in any other manner injure in health or limb, any child, apprentice, or other person under his legal control, shall be fined not exceeding five hundred dollars, or imprisonment in the penitentiary not exceeding five years.”¹

STATEMENT OF THE OFFENSE OF CRUELTY TO A CHILD.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county did willfully and unnecessarily expose to the inclemency of the weather E. F., then and there being the child of the said C. D., and under his legal control, and then and there did thereby injure the health of the said E. F., contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

8. DUELING.

§ 403. Defined. — A duel is an aggravation of the common-law offense of affray,² though it is not necessary that the fighting should be in some public place, as it is in the case of an affray.³ It may be defined to be a fighting together by two or more persons with any deadly weapon in pursuance of such an agreement as permits one to take the life of another in the encounter.⁴ The time of making the agreement is immaterial if it was before the fighting.⁵

§ 404. Provisions of the Statute — Punishment. — “Whoever fights a duel with any deadly weapon, although no death en-

¹ R. S., 359, § 53.

² 2 Bish. Cr. L., § 5; 1 Russ. on Cr., 291, 292.

³ 4 Black. Com. 145; *The State v. Summer*, 5 Strob., 53; *Simpson v. State*, 5 Yerg., 356; *Curlin v. State*, 4 Yerg., 143; *Klum v. State*, 1 Blackf., 377; *State v. Heflin*, 8 Humph., 84.

⁴ 2 Bish. Cr. L., 313; *Herriott v. State*, 1 McMullan, 126.

⁵ *Herriott v. State*, 1 McMullan, 126.

sues, and every second, and whoever aids and abets in such duel, shall be imprisoned in the penitentiary not less than one nor more than five years, or be fined not exceeding three thousand dollars.”¹

§ 405. *Continued — Sending, Accepting or Carrying Challenge.* — “whoever challenges another to fight a duel with any deadly weapon, or sends or delivers any written or verbal message, purporting or intended to be such challenge, or accepts any such challenge or message, and whoever knowingly carries or delivers any such challenge or message, shall be imprisoned in the penitentiary not less than one nor more than five years, or fined not exceeding three thousand dollars.”²

§ 406. *Continued — Disabilities.* — “Whoever shall be convicted under either of the two preceding sections, shall be incapable of holding or being elected to any office of profit, trust or emolument, either civil or military, under the constitution or laws of this state.”³

§ 407. *Continued — By Appointment Made within the State.* — “Whoever, being an inhabitant or resident of this state, by previous appointment or engagement, made within the same, fights a duel without the jurisdiction of this state, and in so doing inflicts a mortal wound upon any person, whereof such person afterwards dies within this state, and every second engaged in such duel, shall be deemed guilty of murder within this state, and may be indicted, tried, and convicted in the county where such death shall happen.”⁴

§ 408. *Continued — Leaving the State to Engage in.* — “If any inhabitant of this state shall leave the same for the purpose of eluding the operation of the provisions herein contained respecting dueling or challenges to fight, with intent of giving or receiving any challenge herein prohibited, or of aiding or abetting in giving or receiving such challenge, and shall give or receive any such challenge, or shall aid or abet

¹ R. S., 361, § 65.

² Id., § 66; *Com. v. Barrett*, 118 Mass., 302.

³ R. S., 361, § 67.

⁴ Id., § 68.

in giving or receiving the same, without this state, he shall be deemed as guilty, and shall be subject to the like punishment and disabilities as if the offense had been committed in this state.”¹

§ 409. *Continued — Former Conviction or Acquittal.* — “Every person indicted under either of the two preceding sections may plead a former conviction or acquittal of the same offense in another state or country, and if such plea be admitted or established, it shall be a bar to any further proceedings against such person for the same offense.”²

§ 410. *Continued — Indictment.* — “It shall not be necessary in an indictment against any person for fighting a duel or against his seconds, aiders, abettors or counselors, or against any person for sending or accepting a challenge, or for carrying any challenge, or delivering any message intended as or purporting to be a challenge, or for being present at the fighting of any duel as a second, or for aiding or giving countenance to any duel, or the sending or accepting any challenge, to specify the nature or kind of the engine, instrument, or weapon with which the duel shall be fought or intended to be fought, so that it be alleged in the indictment that the engine, weapon or instrument was deadly, the probable consequence of fighting with which might be the death of the parties.”³

§ 411. *Continued — Publishing as a Coward.* — “If any person shall, in any newspaper or handbill, written or printed, publish or proclaim any other person as coward, or use any other opprobrious or abusive language, for not accepting a challenge to fight a duel, or for not fighting a duel, such person so offending, on conviction shall be fined not exceeding five hundred dollars, or imprisoned not exceeding three months. The publisher or printer of any such newspaper, handbill, or other publication, may be summoned as a witness, and shall be required to testify against the writer of such handbill or

¹ R. S., 361, § 69.

² Id., 362, § 70.

³ Id., § 71.

publication; and if any such printer shall refuse to testify in relation to the premises, either before the grand or petit jury, he shall be deemed guilty of a flagrant contempt of court, and may be punished by fine and imprisonment, or either: *Provided*, that the testimony given by any such witness shall, in no case, be used in any prosecution against such witness."¹

STATEMENT OF THE OFFENSE OF DUELING.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, by agreement between the said C. D., and one G. H., did unlawfully and willfully fight a duel with the said G. H., with a deadly weapon, the probable consequence of fighting with which might be the death of the said parties, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF CHALLENGING ANOTHER TO FIGHT A DUEL.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, did unlawfully, willfully, and wickedly, challenge² one G. H. to fight a³ duel with and against him,⁴ with a deadly weapon, the probable consequence of fighting with which might be the death of the said C. D. and G. H., contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF ACCEPTING A CHALLENGE TO FIGHT A DUEL.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, did unlawfully, willfully and wickedly accept a challenge to fight a duel with one G. H. with deadly weapons, the probable consequence of fighting with which might be the death of the said C. D. and G. H., contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

¹ R. S., 362, § 73.

² An indictment for sending a challenge in the form of a letter need not set out with either the words of a letter or its substance. *Brown v. Com.*, 2 Va. Cas., 516; *Heffren v. Com.*, 4 Met. Ky., 5.

³ An averment that the defendant gave the prosecutor a challenge to fight in a single combat is equivalent to an averment that he challenged him to fight. *Ivey v. State*, 12 Ala., 276.

⁴ It is not necessary to state the place where the intended duel is to be fought. *Ivey v. State*, 12 Ala., 276.

STATEMENT OF THE OFFENSE OF DELIVERING A CHALLENGE TO FIGHT A DUEL.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, by the desire of G. H. did unlawfully, willfully and knowingly carry and deliver to E. F. a written message, then and there purporting and intended to be a challenge from and on the part of G. H. to E. F. to fight a duel with the said E. F., with deadly weapons, the probable consequence of fighting with which might be the death of the said G. H. and E. F. contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF ACTING AS A SECOND IN A DUEL.

(Commence as in form on page 35) that E. F., on, etc., at, etc., in the said county, by agreement between the said E. F. and G. H. did unlawfully, willfully and wickedly fight a duel with the said G. H., with deadly weapons, the probable consequence of fighting with which might be the death of the said E. F. and G. H.; and that C. D. was then and there unlawfully, willfully and wickedly present, aiding and abetting in said duel as second, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 412. **Evidence — Place.** — It must be proved, not only that the prisoner wrote the challenge, but also that he sent it.¹ The prisoner may be tried in the county in which he mailed the challenge, or in which it was received.² A challenge to fight a duel out of the state is indictable.³ On the trial the declarations of a second are admissible in evidence against the principal.⁴

§ 413. **What is a Challenge.** — No particular form of words is required to constitute a challenge, and it is immaterial whether it is verbal or written.⁵ If it is in writing, parol evidence is admissible to explain it.⁶ The crime is in the invitation to

¹ *Aulger v. People*, 34 Ills., 486.

² *State v. Dupont*, 2 McCord, 334; *Rex v. Williams*, 2 Camp., 506; *Rex v. Burdett*, 4 B. & Ald., 95, 127.

³ *State v. Farrer*, 1 Hawks, 487; *State v. Taylor*, 3 Brev., 243; 1 Const. R., 107.

⁴ *State v. Dupont*, 2 McCord, 334.

⁵ *State v. Perkins*, 6 Blackf., 20; 1 Hawks, 487, § 3; *State v. Strickland*, 2 Nott & McC., 181.

⁶ *Com. v. Hart*, 6 J. J. Marsh, 119; *Com. v. Pope*, 3 Dana, 418.

fight, and is complete when the invitation is delivered,¹ or when the challenge is sent, whether it reach the person to whom it is sent or not.² The words in which it is given are unimportant if they are intended for a challenge, and to be so understood, they come within the law, even though to common apprehension their significations are less broad.³ The words "You are a scoundrel and defrauded the king of his duty. I will prick you to the heart and call you to an account," were held under the circumstances presented to the court not to be sufficient to constitute a challenge.⁴ So a letter containing the following expressions, "It appears that a nife is your favorite of setling fuses, and if so bea the case you can consider that it will sute me, you are a Coward and darsent to except of the offer, i want the same chanse of sharpening mi nife, you can set your day and i will be on hans," was held not to constitute a challenge.⁵ Usually whether the words amount to a serious challenge to fight or were a mere effusion of passion when there is any dispute about the facts, is a question to be determined on the trial of an indictment by the jury.⁶ If the latter, the jury should acquit.⁷ Expressing a readiness to accept a challenge does not constitute one.⁸ So a letter which is not a challenge, but an invitation to another to send one, is not within the statute.⁹ It is sufficient for the prosecution to show that the challenge was sent, for the prosecution is not presumed to have the challenge in its possession.¹⁰

§ 414. *Effect of a Provocation.* — No provocation, however

¹ *State v. Taylor*, 1 Tread., 107.

² *Rex v. Williams*, 2 Camp., 506.

³ *Com. v. Pope*, 3 Dana, 418; *Ivey v. State*, 12 Ala., 276; *Gordon v. State*, 4 Mo., 375; *State v. Faure*, 1 Hawks, 487.

⁴ *Rex v. Pound*, W. Kel., 58.

⁵ *Aulger v. People*, 34 Ills., 486.

⁶ *State v. Strickland*, 2 Nott & McC., 181; *People v. Wood*, 3 City Hall Rec., 139; *Gibbon's Case*, 1 Southard, 40; *Com. v. Levy*, 3 Wheeler, C. C., 245; *Herriott v. State*, 1 McMullin, 126.

⁷ *Com. v. Hart*, J. J. Marsh, Ky., 120.

⁸ *Com. v. Tibbs*, 1 Dana, 524.

⁹ *Aulger v. People*, 34 Ills., 486.

¹⁰ *Rex v. Williams*, 2 Camp., 506; *Com. v. Hooper*, Thach., Cr. Cas., 400.

great, is a justification for challenging another to fight a duel, although evidence of a provocation should be received in mitigation of the punishment.¹

9. FALSE IMPRISONMENT.

§ 415. Provisions of the Statute — Definition — Punishment. — “False imprisonment is an unlawful violation of the personal liberty of another, and consists in confinement or detention without sufficient legal authority. Any person convicted of false imprisonment shall be fined in any sum not exceeding five hundred dollars, or imprisoned not exceeding one year in the county jail.”²

STATEMENT OF THE OFFENSE OF FALSE IMPRISONMENT.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, did unlawfully and forcibly make an assault upon E. F.,³ and⁴ did then and there unlawfully and injuriously, against the will and without the consent of the said E. F., and without any warrant or sufficient legal authority⁵ or any reasonable or justifiable cause whatsoever, imprison, confine and detain the said E. F. for a long time, *to wit.*, for the space of three days (*conclude as in form on page 35*).

§ 416. Evidence. — All the prosecutor has to prove is the imprisonment; for that is presumed to be unlawful until the contrary is shown.⁶ It is for the defendant to justify it by proving that it was lawful, which he may do by showing that he had authority to arrest the party imprisoned without a

¹ 1 Arch. C. P. & Pl., 927; Roscoe Cr. Ev., 376; Rex v Rice, 3 East, 581.

² R. S., 365, § 95.

³ The allegation of an assault is unnecessary. 3 Chitty Cr. L., 835, n. d.; 3 Stark. Ev., 1448; 2 Bish. Cr. P., § 366.

⁴ Charging both an assault and false imprisonment does not make the statement bad for duplicity, for when taken together they constitute one offense. *Francisco v. State*, 4 Zab., 30, 32.

⁵ An indictment should negative the authority. *Redfield v. State*, 24 Texas, 133. But it has been held that the allegation that the person ofended against was “unlawfully and feloniously imprisoned” was sufficient, and that it need not be added that it was done without legal authority, for the latter was implied by the former. *U. S. v. Lapoint*, 1 Morris, 146.

⁶ 2 Arch. C. P. & Pl., 94.

warrant,¹ or by virtue of civil or criminal process.² The words "legal authority" in the statute, require process to be procured and issued in good faith on probable cause, otherwise the prosecutor is liable;³ but a writ issued by a court having jurisdiction of the subject matter, and regular on its face, will protect an officer who executes it in good faith and returns it regularly from a prosecution for false imprisonment.⁴

§ 417. **What an Imprisonment.**—Every confinement is an imprisonment, whether it be in a common prison or in a private house, or even by forcibly detaining one in the street,⁵ or by confining him in one prison when sentenced to be confined in another.⁶ Where a counselor-at-law went into the jail to see a prisoner, telling the turnkey as he went in that he should not be detained but six minutes, but the turnkey locked him in for the space of half an hour, it was held that the turnkey was guilty of false imprisonment.⁷ But it has been decided that the lifting up a person in his chair and carrying him out of a room in which he was sitting, and keeping him out, was not a false imprisonment.⁸ Where, upon a warrant being shown a person, he voluntarily and without compulsion or a declaration of arrest attended the constable who had the warrant to the magistrate, it was held there was no false imprisonment.⁹ If one employs another to make an arrest under circumstances making the arrest illegal, such employer is guilty of false imprisonment.¹⁰

¹ *Ante* § 61, 62.

² *Ante* § 56-60; *Floyd v. State*, 7 Engl., 43; *Mitchell v. State*, 7 Engl., 50.

³ *Siomer v. People*, 25 Ills., 70.

⁴ *Rowland v. Veale*, 1 Cowper, 18; *Taft v. Ashbaugh*, 13 Ills., 602; *ante* § 46.

⁵ *Floyd v. State*, 7 Engl. Ark., 43; *Johnson v. Tompkins*, 1 Bald., 571; *State v. Rollins*, 8 N. H., 550; *Long v. Rogers*, 17 Ala., 540.

⁶ 1 Bish. Cr. P., § 1152; 1 Salk., 408; *Skin.*, 664; and see *Millar v. State*, 2 Kansas., 174.

⁷ *People v. Lent*, 4 City Hall Rec., 56.

⁸ 2 Arch. C. P. & Pl., 92.

⁹ *Arrowsmith v. Mesurier*, 2 N. R., 211; see also *Simpson v. Hill*, 1 Esp. R., 431; *Russen v. Lucas*, 1 Car. & P., 153.

¹⁰ *Floyd v. State*, 7 Engl., 43; *Reg. v. Tracy*, 6 Mod., 178.

§ 418. **Continued — The Imprisonment may be by Words.** — Words are sufficient to constitute an imprisonment if the person is restrained thereby,¹ for one is not obliged to incur the risk of personal violence and insult by resisting until actual violence is used,² though some of the older authorities held that false imprisonment necessarily included a battery.³

§ 419. **When Parent Liable for Imprisoning his Child.** — While the law gives the parent a large discretion in the exercise of authority over his children, yet this authority must be exercised within the bounds of reason and humanity, and if the parent commits wanton and needless cruelty upon his child, the law will punish him. So where the parent confined his child, a blind and helpless boy, in a cold and damp cellar without fire during several days in mid-winter, giving as an excuse therefor that the child was covered with vermin, it was held that he was liable to indictment and punishment for false imprisonment.⁴

§ 420. **Imprisonment by a Military Officer — When Justified.** — In time of war a reasonable suspicion that a person is transporting munitions of war to the enemy's country is a good defense by a military officer to a prosecution for false imprisonment of such person.⁵

10. KIDNAPPING.

§ 421. **Definition and Punishment.** — "Whoever willfully and without lawful authority forcibly or secretly confines or imprisons any other person within this state against his will, or forcibly carries or sends such person out of the state, or forcibly seizes or confines or inveigles or kidnaps any other person, with the intent to cause such person to be secretly confined

¹ *Pike v. Hanson*, 9 N. H., 491; *Bloomer v. State*, 3 Sneed, 66; *Smith v. State*, 7 Humph., 43.

² 3 Stark. Ev., 1448.

³ 1 Russ. on Cr., 753; 1 Gab. Cr. L., 82; 1 Harring., 143; and see *Long v. Rogers*, 17 Ala., 540.

⁴ *Fletcher v. People*, 52 Ills., 396.

⁵ *Clow v. Wright*, Brayt., 118.

or imprisoned in this state against his will, or to cause such person to be sent out of the state against his will, shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding one thousand dollars, or both. This section shall not extend to a parent taking his or her minor child, unless such parent is deprived of the right to have the custody of such child by the order of a court of competent jurisdiction."¹

STATEMENT OF THE OFFENSE OF KIDNAPPING.

(Commence as in form on page 35) that C. D. on, etc., at etc., in the said county, did unlawfully make an assault on one E. F., and him did then and there beat, bruise and ill-treat, and without lawful authority, did then and there falsely, forcibly and feloniously imprison the said E. F. within this said state of Illinois against his will,² and without lawful authority did then and there willfully, forcibly and feloniously kidnap,³ carry and send the said E. F. out of the said state of Illinois⁴ into another state, *to wit.*, into the state of Kentucky, against the will of the said E. F., contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 422. *Effect of the Consent of the Child.*—The consent of a child of very immature years does not make the otherwise unlawful abduction of such child with the intent required by law any the less kidnapping. Just how old a child must be before he is capable of consenting, will depend very much upon the circumstances of each case. Children of four,⁵ five,⁶

¹ R. S., 377, § 166.

² The allegations of an assault, battery and false imprisonment may be omitted, but without them the defendant cannot be held for the lesser offense. *Com. v. Turner*, 3 Met., 19, 26. And the insertion of these allegations will not make an indictment bad for duplicity. 2 Bish. Cr. P., § 692; *Com. v. Nickerson*, 5 Allen, 518.

³ At common law it is not sufficient to charge the defendant with kidnapping. *Click v. State*, 3 Texas, 282.

⁴ It is sufficient to follow the terms of the statute. *Hamilton v. Com.*, 3 Pa., 142; *State v. Griffin*, 3 Harring. Del., 559; *State v. McRoberts*, 4 Blackf., 178.

⁵ *State v. Farrar*, 41 N. H., 53.

⁶ *Com. v. Robinson*, *Thatch. Cr. Cas.*, 488.

six¹ and nine² years respectively have been held to be too young to render their consent available in the defense.

§ 423. **Physical Force Need not be Used.**—It is not necessary that physical force be used. It will be sufficient to show that the mind was operated upon by falsely exciting the fears by the use of threats or other undue influence, amounting substantially to a coercion of the will as a substitute for violence. In coming to a conclusion in such case the jury should take into consideration the condition of the person kidnapped, his or her age, education and condition of mind, and all the circumstances connected with the transaction as detailed by the proof. The crime is more frequently committed by threats and menaces than by employment of actual physical force and violence.³ Procuring the intoxication of a sailor as a means of getting him on shipboard without his consent, and then taking him into a ship and to another country;⁴ or carrying away a free black child five years of age against her will from the family of the person by whom she had formerly been owned as a slave,⁵ is kidnapping.

§ 424. **Effect of a Decree as to the Custody of the Child.**—Where on a decree for a divorce the custody of the child is assigned to one of the parents, if the other parent seizes him and carries him off, he is guilty of kidnapping.⁶ And it is the same offense in a third person who by the request of the parent not having the right to the custody of the child by the order of the court, seizes him and carries him away, though the child is not in the actual possession of the parent entitled to his custody, but is at school to which the latter had sent the child for education.⁷

¹ *State v. Rollins*, 8 N. H., 550.

² *Com. v. Nickerson*, 5 Allen, 518, 527.

³ *Moody v. People*, 20 Ills., 315.

⁴ *Hadden v. People*, 25 N. Y., 373.

⁵ *Com. v. Robinson*, *Thatch. Cr. Cas.*, 488.

⁶ *State v. Farrar*, 41 N. H., 53.

⁷ *Com. v. Nickerson*, 5 Allen, 518.

11. MAYHEM.

§ 425. Provisions of the Statute — Definition and Punishment. — “Whoever, with malicious intent to maim or disfigure, cuts or maims the tongue, puts out or destroys an eye, cuts or tears off an ear, cuts, slits or mutilates the nose or lip, cuts off or disables a limb or other member of another person, shall be imprisoned in the penitentiary not less than one nor more than twenty years, or fined not exceeding one thousand dollars, and confined in the county jail not exceeding one year.”¹

STATEMENT OF THE OFFENSE OF MAYHEM.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, with a knife which the said C. D. then and there held in his right hand, did unlawfully, willfully and feloniously with malicious intent to maim and² disfigure, cut out the tongue of the said A. B.³ (or “with his thumb and fingers did unlawfully, willfully and feloniously, and with malicious intent to maim and disfigure, put out and destroy the right⁴ eye of the said A. B.”), and the said A. B. was thereby then and there maimed,⁵ contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

§ 426. Evidence — 1. The Maiming must be Proved. — On an indictment for biting off an ear it is sufficient that a part of the ear was bitten off;⁶ yet if the part bitten off is so small that it does not disfigure the person, and can only be discovered on close inspection and examination when attention is

¹ R. S., 382, § 207.

² The word “and” may be properly substituted for the word “or” in the statute. *Angel v. Com.*, 2 Va. Cas., 231.

³ It is sufficient to describe the offense in the language of the statute. *State v. Buley*, 8 Port., 472; *Respublica v. Reiker*, 3 Yates, 282. An indictment will be defective unless it substantially pursues the statutory words. *Com. v. Lester*, 2 Va. Cas., 198.

⁴ It has been held that in an indictment for biting off an ear it is not necessary to state whether it was the right or left ear. *State v. Green*, 7 Ired., 39.

⁵ An indictment for mayhem at common law, in addition to the statement of the injury, must also charge that the party was thereby maimed. *Hawkins P. C.*, 179, 224; *Chitty Cr. L.*, 164, 219, 2 Black. Com., 252; *Chick v. State*, 7 Humph., 161.

⁶ *State v. Gerkin*, 1 Ired., 121; *State v. Abram*, 10 Ala., 928.

directed to it, the offense is not mayhem.¹ Disabling the arm of a man by shooting, is a sufficient maiming within the statute.² The cutting off, disabling or weakening a man's hand or finger, or striking out an eye³ or foretooth, or castrating him, are maims.⁴ At common law the cutting off of a nose, ear or the like was not a mayhem, because the effect was simply to disfigure, not to weaken,⁵ but our statute makes these offenses mayhem.⁶

§ 427. 2. **There must be a Malicious Intent to Maim or Disfigure.**⁷ — This intent will usually be presumed from the act of maiming.⁸ It is not necessary where the injury is done in sudden conflict that the defendant should have formed the malicious intent to maim or disfigure previous to the conflict; it is sufficient that he formed such intent during the conflict.⁹

§ 428. **Defense.** — It is good defense to an indictment for mayhem that the maiming was necessarily done in self-defense.¹⁰

§ 429. **Acquittal of the Mayhem and Conviction of a lesser Offense.** — Where an indictment for mayhem sufficiently alleges an assault, which it may do without using the word "assault,"¹¹ if the proof fails to show a mayhem, the defendant may be convicted of the assault and acquitted of the mayhem.¹² One charged with being present, aiding and abetting at a mayhem

¹ *State v. Abram*, 10 Ala., 928.

² *U. S. v. Scroggins*, 1 Hemp., 478.

³ *Chick v. State*, 7 Humph., 161.

⁴ 1 East P. C., 393.

⁵ *Id.*; 3 Chitty Cr. L., 784; *Scott v. Com.*, 6 Serg. & R., 224; *State v. Mairs*, 1 Cox N. J., 453; *State v. Newell*, 7 Mass., 248.

⁶ R. S., 382, § 207.

⁷ *Com. v. Lancake*, 1 Yeates, 417; *State v. Danforth*, 3 Conn., 112; *Penn. v. McBirne*, Add., 30.

⁸ *State v. Evans*, 1 Hayw., 281; *State v. Crawford*, 2 Dev., 425; *State v. Gerkin*, 1 Ired., 121; *contra*, *Penn. v. McBirne*, Add., 30.

⁹ *State v. Simmons*, 3 Ala., 497.

¹⁰ *Hayden v. State*, 4 Blackf., 516; *Cockcroft v. Smith*, 2 Salk., 642; 1 Ld. Raym., 177; *State v. Abram*, 9 Ala., 928.

¹¹ *Brenham v. State*, 1 Iowa, 542.

¹² *Guest v. State*, 19 Ark., 405.

may, if the evidence justifies it, be convicted of the assault and battery, merely while the principal of the first degree is convicted of the mayhem.¹

12. POISONING.

§ 430. Provisions of the Statute — Punishment. — “Whoever willfully and maliciously administers, or causes to be administered, or taken by any person, any noxious or destructive substance or liquid with intent to cause the death of such person, or mingles any poison with food, drink or medicine, or willfully poisons any spring, well or reservoir of water, with such intent, shall be imprisoned in the penitentiary not exceeding twenty years.”²

STATEMENT OF THE OFFENSE OF POISONING WITH INTENT TO KILL.³

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, feloniously, willfully and maliciously did administer (*or “cause to be administered”*) to G. H., a certain noxious, poisonous and destructive substance called arsenic, with intent thereby then and there feloniously, unlawfully, and willfully with malice aforethought, to cause the death of the said G. H., contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

13. RAPE.

§ 431. Provisions of the Statute — Definition and Punishment. — “Rape is the carnal knowledge of a female, forcibly and against her will. Every male person of the age of fourteen years and upwards, who shall have carnal knowledge of any female child under the age of ten years, either with or with-

¹ State v. Absence, 4 Port., 397.

² R. S., 388, § 230.

³ It has been held that an indictment which averred, that the defendant feloniously, willfully and maliciously mingled a drachm of deadly poison called belladonna, with the food of a certain woman, with intent thereby feloniously, willfully and of his malice aforethought to kill her, was sufficient without averring that he knew the belladonna to be a deadly poison, or did the act knowingly, or that the woman was about to eat the food, or that he intended her to eat it. Com. v. Berse, 108 Mass., 487.

out her consent, shall be adjudged to be guilty of the crime of rape. Every person convicted of the crime of rape shall be imprisoned in the penitentiary for a term not less than one year, and may be extended to life."¹

§ 432. Continued — Emission. — "It shall not be necessary to prove emission to convict any person of the crime of rape."²

STATEMENT OF THE OFFENSE OF RAPE.

(Commence as in form on page 35) that C. D.,³ on, etc., at, etc., in the said county, violently and feloniously did make an assault⁴ in and upon one G. H.,⁵ then and there being a female,⁶ and her the said G. H. then and there violently and against her will,⁷ feloniously⁸ and forcibly⁹ did ravish¹⁰ and

¹ R. S., 388, § 237.

² Id., § 238.

³ It is not necessary to allege that the defendant was fourteen years of age or upwards, nor that the female was not the wife of the defendant. Com. v. Scannel, 11 Cush., 574; Com. v. Fogerty, 8 Gray, 489; People v. Ah. Yick, 29 Cal., 575; State v. Farmer, 4 Ired., 224; State v. Storkey, 63 N. C., 7.

⁴ The words "did make an assault" are probably not essential. Reg. v. Allen, 9 Car. & P., 521, 2 Moody, 179; O'Connell v. State, 6 Minn., 279, 285; although without them in case of the failure to prove the rape, the defendant could not be convicted of a simple assault. 2 Bish. Cr. P., § 955.

⁵ As to a variance between the proof and allegation as to the name of the injured person, see State v. Emeigh, 18 Iowa, 122; ante page 272, note 5.

⁶ It has been held, where a similar form was used, that the court could and must see that G. H. was a female, without inserting the words "then and there being a female." State v. Hussey, 7 Iowa, 409; State v. Farmer, 4 Ired., 224; Taylor v. Com., 20 Grat., 825; Com. v. Bennet, 2 Va. Cas., 235; Harman v. Com., 12 Serg. & R., 69.

⁷ The allegation "against her will" is essential unless the female is an infant under ten years of age. 2 Stark. Cr. Pl., 409; 3 Chitty Cr. L., 815; 2 Arch. C. P. & Pl., 160; State v. Jim., 1 Dev., 142.

⁸ At common law the word "feloniously" was essential. 3 Chitty Cr. L., 811; Mears v. Com., 2 Grant C., 385; Nevills v. State, 7 Cold., 78; contra, Com. v. Scannel, 11 Cush., 547.

⁹ The word "forcibly" should be inserted. To allege that it was done violently will not be sufficient. State v. Blake, 39 Me., 332; contra, Harman v. Com., 12 Serg. & R., 69; Com. v. Fogarty, 8 Gray, 489.

¹⁰ Under the English statute using the word "ravish" it was held necessary to use it in an indictment. 1 Hale, 628; 3 Chitty Cr. L., 812; Harman v. Com., 12 Serg. & R., 69; Gonglemann v. People, 3 Park. Cr. R., 15.

carnally know,¹ contrary² to the form of the statute in such case made and provided (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF RAPE UPON A CHILD UNDER TEN YEARS OF AGE.

(*Commence as in form on page 35*) that C. D. on, etc., at, etc., in the said county, then and there being a male person of the age of fourteen years and upwards, unlawfully and feloniously did make an assault in and upon one G. H., then and there being a female child under the age of ten years,³ *to wit.*, of the age of eight years, and her, the said G. H., then and there wickedly, unlawfully and feloniously,⁴ did ravish and carnally know, contrary⁵ to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 433. Evidence — 1. There must be a Penetration, or the parts of the male must be inserted in those of the female, which is an essential part of the offense and must be proved.⁶ But a very slight penetration is sufficient,⁷ though it do not break the hymen or destroy the marks of virginity.⁸ And in case of a child under ten years of age, or of an idiot, the fact of

¹ The words "carnally know" are substantially in the statute, and should be inserted. 1 Hale, 637; 3 Chitty Cr. L., 812.

² It is usual to conclude against the form of the statute, etc., but as the offense was a felony at common law it has been thought to be unnecessary. Barb. Cr. L., 74; 3 Chitty Cr. L., 812; 1 East P. C., 448.

³ The allegation that the child is under ten years of age is necessary, unless it is alleged that the act was done against her will. Com. v. Sullivan, 6 Gray, 477; Caruth. v. Sugland, 4 Gray, 7; State v. Farmer, 4 Ired., 224.

⁴ The words "against her will" are made unnecessary by statute. R. S., 388, § 237; it was otherwise at common law. Barb. C. L., 75; Fizell v. State, 25 Wis., 364.

⁵ The conclusion should be contrary to the form or the statute, for at common law without force, it was not a felony. Barb. Cr. L. 75; People v. Enoch, 13 Wen., 159; *ante* page 37, note 1.

⁶ Hale P. C., 638; Rex v. Jordan, 9 Car. & P., 118; Audley's Case, 3 Howell, State Tr., 401; Fitzpatrick's C., 3 Howell, State Tr., 419; Robertson's Case, 1 Swinton, 93.

⁷ 3 Inst., 59; 2 Arch. C. P. & Pl., 162, 163; Reg. v. Hughes, 9 Car. & P., 752; State v. Le Blanc, 3 Brev., 339; 1 Tread., 354; Reg. v. Lines, 1 Car. & K., 393.

⁸ 1 East P. C. C., 10, § 3, 438; Reg. v. McRue, 8 Car. & P., 641; Reg. v. Moody, 190; Rex v. Russen 1 East P. C., 438; Stroud v. Com., 11 Serg. & R., 177; *contra*, Rex v. Gammon, 5 C. & P., 321; Brauer v. State, 25 Wis., 413.

penetration may be found by the jury from circumstances.¹ At common law there were some authorities holding that proof of emission in the body was necessary to complete the offense,² but now by statute this proof is not necessary.³ So that now it is presumed that evidence of penetration alone is sufficient even though the fact of emission be negatived by the evidence.⁴ But this is not entirely clear, for though the statute dispenses with proof of emission it does not say, as the English statute does, the offense is complete without emission.⁵

§434. 2. It must be Proved that the Rape was Done by Force and Against the Will of the Woman upon whom it was Committed,⁶ except when committed on a female child under the age of ten years.⁷ Where a man by fraud went to bed to a married woman, and she believing him to be her husband, allowed him to have connection with her, this was held not to be a rape.⁸ So where the defendant obtained possession of the person of the prosecutrix by fraud and had used no force, it was held that he could not be convicted of rape.⁹ In our opinion it would be more in accordance with good morals and good sense for the courts to hold as they have held, that it is as much a rape when effected by a fraud or by stratagem as by force,¹⁰ though it must

¹ Id.; *State v. Tarr*, 28 Iowa, 397.

² 2 Arch. C. P. & Pl., 164, 165; 12 Co., 36, 37; 3 Inst., 59; *Hill's Case*, 1 East P. C., 439; *Rex v. Burrows*, Russ. & Ry., 519; *State v. Gray*, 8 Jones N. C., 170; *contra*, 1 East P. C., 437; *Robertson's Case*, 93, 104; *Com. v. Thomas*, 1 Va. Cases, 307; *State v. Sullivan*, Add., 143.

³ R. S., 388, § 237.

⁴ 2 Bish. Cr. L., 1129.

⁵ Id.; *Rex v. Russell*, 1 Moody & R., 112.

⁶ 3 Chitty Cr. L., 810; *People v. Morrison*, 1 Park. Cr. R., 625; *Woodin v. People*, 1 Park. Cr. R., 464; *Lewis v. State*, 30 Ala., 54; *Kelly v. Com.*, 1 Grant, Pa., 483.

⁷ R. S., 388, § 237.

⁸ *Reg. v. Saunders*, 8 Car. & P., 265; *Reg. v. Williams*, 8 Car. & P., 286; *Rex v. Jackson*, Russ. & Ry., 487; *Reg. v. Clark*, Dears., 397, 29 Eng. Com. L. & Eq., 542; *Reg. v. Barrow*, Law Rep. 1 C. C., 156; *Wyatt v. State*, 2 Swan, Tenn., 394; *Lewis v. State*, 30 Ala., 54; *Com. v. Field*, 4 Leigh, 648; *contra*, *State v. Shepard*, 7 Conn., 54; *People v. Metcalf*, Wheeler C. C., 381.

⁹ *People v. Barton*, 1 Wheeler, C. C., 378.

¹⁰ *Moody v. People*, 20 Ills., 319; *State v. Shepard*, 7 Conn., 54

be conceded that the weight of authority is the other way.¹ If a man has connection with a woman while she is laboring under a delirium,² or is intoxicated with liquor given to her by him,³ or is insensible by drugs given to her for that purpose,⁴ he is guilty of rape the same as if actual force had been used.⁵ It is no mitigation whatever of the offense that the woman at last yielded to the violence of the ravisher if her consent was forced by fear of death or duress.⁶ Nor is it any defense that she consented after the act.⁷ The notion that if a woman conceived it could not be rape, because in that case she must have consented appears to be quite exploded.⁸

§ 435. What Resistance Essential—Presumption from Friendly Conversation, Marks, etc.—Opinion.—It ought to appear that there was the utmost reluctance and the utmost resistance on the part of the woman.⁹ For if she half-consents and half-resists, it is no rape,¹⁰ or as it has been said a mixed case will not do. The connection must be absolutely against her will.¹¹ At least she ought to defend her virtue with as much force and energy as she would her money. Nature has given her hands and feet with which she can strike and kick, teeth to bite and a voice to cry out—all these should be put in requisition in

¹ 3 Greenl. Ev., § 211.

² *Rex v. Charter*, 13 Shaw J. P., 766.

³ *Reg. v. Champlin*, 1 Car. & K., 746; 1 Denis, C. C., 90.

⁴ 2 Arch. C. P. & Pl., 177; *Com. v. Beal*, Phila. Q. S., 1854; *State v. Green*, Whart. & Stil., Med. Jur., § 459.

⁵ 1 Whart. Cr. L., § 1146; 2 Bish. C. L., 1121.

⁶ 1 Hawks C., 41, § 7; *Wright v. State*, 4 Humph., 194; *Pleasant v. State*, 8 Eng., 360; *Reg. v. Hallett*, 9 Cr. & P., 748; *Reg. v. Day*, 9 Car. & P., 722.

⁷ 1 Hawk C., 41, § 7.

⁸ 1 Hale, 631; 1 Hawk C., § 8; *U. S. v. Dickinson*, 1 Hemp., C. C. 1.

⁹ *People v. Morrison*, 1 Park, Cr. R., 625; *Woodin v. People*, 1 Park, Cr. R., 464; *contra*, *Com. v. Michael*, 110 Mass., 405; and see *Croghan v. State*, 22 Wis., 444.

¹⁰ *People v. Hulse*, 3 Hill, 316; *Reg. v. Hallett*, 9 Car. & P., 748; *State v. Murphy*, 6 Ala., 765; *Pleasant v. State*, 8 Engl., 360; *Pollard v. State*, 2 Iowa, 567; *Hull v. State*, 22 Wis., 580.

¹¹ *People v. Abbott*, 19 Wen., 195.

the defense of her chastity,¹ unless she is an idiot,² insane,³ an infant too young to be expected to resist⁴ or is too feeble to be able to resist,⁵ or is prevented from resisting by fear,⁶ or is imposed upon by fraud,⁷ or is insensible by sleep⁸ or intoxication,⁹ or otherwise, or there is some other good excuse for not resisting,¹⁰ or the offense is not a rape. Where the prosecutrix made no outcry though her husband was within hearing, and she and her husband remained in a friendly conversation with the defendant for an hour and a half, after the alleged commission of the offense it was held that these circumstances raised a strong presumption that no rape was committed.¹¹ It should appear that there is evidently an inequality of strength between the parties;¹² for it would be almost impossible for one person to rape another of equal strength.¹³ The opinion of a physician as to whether the defendant's health and strength was sufficient to have carnal connection with the woman against her will is incompetent, for the jury can judge as to that as well as the witness.¹⁴ It should appear that there were some marks of violence upon the person of the alleged ravished woman,¹⁵ and her statement

¹ *People v. Morrison*, 1 Park. C. R., 644; *State v. Cross*, 12 Iowa, 66.

² *People v. McGee*, 1 Denio, 19; *Rex v. Ryan*, 2 Cox C. C., 115; *McNamara's Case*, Arkley, 521; *State v. Crow*, 10 West L. Jour., 501; *contra*, *Crosswell v. People*, 13 Mich., 427; *State v. Tarr*, 28 Iowa, 397.

³ 2 Bish. Cr. L., §§ 1121, 1123.

⁴ *Stephens v. State*, 11 Ga., 225; *Reg. v. Case*, Temp. & M., 318; *State v. Cross*, 12 Iowa, 66; *Hays v. People*, 1 Hill, 351.

⁵ *Stephens v. State*, 11 Ga., 225.

⁶ 1 Hawks P. C. C., 41; *Moody v. People*, 20 Ills., 318; *Pleasant v. State*, 8 Engl. Ark., 360; *Wyatt v. State*, 2 Swan, 394; *Croghan v. State*, 22 Wis., 444.

⁷ *Reg. v. Case*, 1 Eng. L. & Eq., 544; *Rex v. Stanton*, 1 Car. & K., 415.

⁸ 2 Arch. C. P. & Pl., 177; *Reg. v. Ryan*, 2 Cox C. C., 115.

⁹ *Com. v. Burke*, 105 Mass., 376.

¹⁰ 3 Greenl. Ev., § 211; *Croghan v. State*, 22 Wis., 444.

¹¹ *Barney v. People*, 22 Ills., 160.

¹² 1 Hale, 631; 1 Hawks C., 41, § 7.

¹³ 2 Arch. Cr. P. & Pl., 176.

¹⁴ *Woodin v. People*, 1 Park. C. R., 464.

¹⁵ 1 Hale, 631; 1 Hawks C., 4; § 7; *State v. Cross*, 12 Iowa, 66.

is greatly strengthened if the marks are found to have been present and seen by others immediately after the commission of the offense.¹

§ 436. **Examination of the Woman as to her Complaining — Of Other Witnesses.** — It is usual in cases of rape to ask the woman if she made any complaint, and if so, when and to whom, and if she stated the name of the offender to the person to whom she complained, which question may be answered.² And if she mentions a person to whom she complained such person may be called to prove such fact for the purpose of sustaining and confirming such testimony given in court.³ But neither the woman nor the person so called should be allowed to state the particulars of the complaint during the examination in chief.⁴ As by giving the language used by the woman, alleged to have been ravished at the time she complained,⁵ or the name of the offender mentioned by her in complaining.⁶ Upon this point, however the authorities are not agreed, some of them holding that witnesses may be called to prove the details of the complaint made by the prosecutrix against the accused immediately after the commission of the offense, as a part of the *res gestæ*, and not as proof of the statement.⁷ But the weight of authority and reason is clearly opposed to allowing witnesses to state anything, but the woman complained to the

¹ 2 Arch. C. P. & Pl., 170.

² *Kex v. Clark*, 2 Stark. N. P. C., 241; *Rex v. Brazier*, 1 East P. C., 44; *State v. Richards*, 33 Iowa, 420; *Nugent v. State*, 18 Ala., 521. If there has been some delay in making the complaint this may be explained by showing good cause for the delay. 1 East P. C., 445; *State v. Knapp*, 4 N. H., 155.

³ *Phillips v. State*, 9 Humph., 246; *Rex v. Stroner*, 1 Car. & K., 650.

⁴ *Stephen v. State*, 11 Ga., 225; *Reg. v. Megson*, 9 Car. & P., 420; *People v. McGee*, 1 Denio, 19.

⁵ *Reg. v. Walker*, 2 M. & Rob., 212; *State v. Richards*, 33 Iowa, 420.

⁶ 2 Arch. C. P. & Pl., 170; *Rex v. Osborne*, C. & M., 622.

⁷ *State v. Johnson*, 28 Vt., 512; *State v. Peter La. An.*, 521; *McCombs v. State*, 8 Ohio S., 643; *Johnson v. State*, 17 Ohio, 593; *Phillips v. State*, 9 Humph., 246.

person and named the offender,¹ leaving it for the counsel of the prisoner to call out what was said by the woman in complaining if he deems it advisable.² The corroborating evidence of the person to whom she says she complained, is not indispensably necessary to confirm her statement and entitle it to full credit.³ If, however, the person on whom the offense is charged to have been committed, is not competent to be a witness by reason of infancy,⁴ idiocy,⁵ insanity or the like, or is dead,⁶ or is not made a witness, no evidence of the assertions or declarations of such person descriptive of the offense or the offender or of the fact that she complained immediately after the offense was committed can be received in evidence.⁷ The court may in its discretion allow the prosecutrix to be asked on cross-examination whether the treatment complained of was with her consent or against her will.⁸

§ 437. **What Evidence Admissible as Tending to Show that the Woman Consented.** — For the purpose of raising the presumption that the woman consented, it may be shown that she bore a notoriously bad character for want of chastity and common decency;⁹ that she was in fact a common prostitute;¹⁰ or

¹ *Pleasant v. State*, 15 Ark., 624; *Brogy v. Com.*, 10 Grat., 722; *Reg. v. Alexander*, 2 Crawf. & Dix. C. C., 126; *Reg. v. Mangleman*, 2 Crawf. & Dix. C. C., 350; *People v. McGee*, 1 Denio, 19; *State v. Knapp*, 45 N. H., 148.

² *Roscoe Cr. Ev.*, 862; *Reg. v. Walker*, 2 M. & R., 212.

³ *Woodin v. People*, 1 Park. Cr. R., 464; but see *Rex v. Stroner*, 1 Car. & K., 650.

⁴ *Reg. v. Guttridge*, 9 Car. & P., 471; *Reg. v. Megson*, 9 Car. & P., 428; *contra*, *Brazur's Case*, 1 East P. C., 443.

⁵ *People v. McGee*, 1 Denio, 21.

⁶ *Reg. v. Megson*, 9 Car. & P., 428; *Stephen v. State*, 11 Ga., 225; *Pleasant v. State*, 15 Ark., 624.

⁷ 2 Arch. C. P. & Pl., 169-173.

⁸ *Woodin v. People*, 1 Park. Cr. R., 464.

⁹ 1 Phil. Ev., 762; *Watery v. Firber*, 18 Wis., 500; *Kelley v. Nelson*, 5 Wis., 630.

¹⁰ 1 East P. C., 444, 445; *Roscoe Cr. Ev.*, 708; *People v. Abbott*, 19 Wen., 196; *R. v. Barker*, 3 Car. & P., 589; *R. v. Clark*, 2 Car. & K., 246; *R. v. Guttridge*, 9 Car. & P., 471; *Com. v. Regan*, 105 Mass., 593.

was a street walker;¹ or was the concubine of the ravisher;² or had voluntarily had connection with him.³ And the better opinion seems to be, though the authorities are numerous against and possibly the weight of authority is to the contrary,⁴ that the woman may be asked on cross-examination, whether she has had connection with other men, and that evidence may be given of particular acts indicating on her part a want of chastity, for a woman having consented to illicit intercourse with another man or with other men, or showing by her acts that she is inclined to be unchaste, would be much more likely to consent to have connection with the prisoner than a virtuous woman, who would look upon such an act with horror.⁵ So evidence of familiarities by the prisoner and others tending to disprove the allegation of force is admissible.⁶ And it seems that the prosecutrix may be cross-examined as to all these matters,⁷ and in such case is not privileged from answering;⁸ and if she deny any of these facts, the prisoner may produce evidence to contradict her,⁹ or he may call

¹ *Camp v. State*, 3 Ga., 419.

² 1 *Hawks C.*, 41, § 7; 1 *East P. C.*, 445; 2 *Arch. C. P. & Pl.*, 158.

³ 2 *Stark Ev.*, 700; *Rex v. Martin*, 6 Car. & P., 562; *Pleasant v. State*, 15 Ark., 624; *State v. Jefferson*, 6 Ired., 305; *State v. Forshner*, 43 N. H., 89; *People v. Abbott*, 19 Wen., 192.

⁴ 3 *Greenl. Ev.*, § 214; 2 *Bish. Cr. P.*, § 965 and authorities there cited, *McCombs v. State*, 8 Ohio S., 643; *People v. Jackson*, 3 Park. Cr. R., 399; *Rex v. Hodgson*, Russ. & Ry., 211; *King v. Clark*, 2 *Stark. R.*, 241; *State v. Jefferson*, 6 Ired., 305; *Reg. v. Cloys*, 5 Cox, 146; *Pleasant v. State*, 15 Ark., 624.

⁵ *People v. Abbott*, 19 Wen., 192; *State v. Johnson*, 28 Vt., 512; *State v. Murray*, 63 N. C., 31; *Camp v. State*, 3 Kelley, 417; *Rex v. Martin*, 6 Car. & P., 562; *State v. Jefferson*, 6 Ired., 305; *Reg. v. Robins*, 2 M. & Rob., 512; *Rex v. Robins*, 2 Moody & R., 512; *People v. Benson*, 6 Cal., 221; *Com. v. McDonald*, 110 Mass., 406.

⁶ *People v. Benson*, 6 Cal., 221.

⁷ *People v. Abbott*, 19 Wen., 192; *Thomas v. Newton*, 1 Moody & M., 48, n. b.; *Southard v. Rexford*, 6 Cowen, 264; *Treat v. Brown*, 4 Conn. R., 418; *Reg. v. Robins*, 2 Moody & R., 512.

⁸ *People v. Abbott*, 19 Wen., 192; *Treat v. Browning*, 4 Conn., 408; *Thomas v. Newton*, 1 Moody & M., 48, n. b.; *Southard v. Rexford*, 6 Cowen., 254; *Rex v. Robbins*, 2 Moody & R., 513; *contra*, *R. v. Hodgson*, Russ. & R., 211.

⁹ 2 *Arch. C. P. & Pl.*, 175; *Rex v. Aspinwall*, 3 *Stark. Ev.*, 700, 952; *contra*, *People v. Jackson*, 3 Park. Cr. R., 391.

witnesses to prove such facts though the woman has not previously been interrogated on the subject.¹ But upon these questions the authorities are very conflicting,² and it is impossible to determine how the courts of this state will finally decide.

§ 438. **What not an Excuse — Partial Consent Acquits.** — It is, however, no excuse for the party committing the offense of rape that the woman was a strumpet³ or the concubine of the ravisher,⁴ for she is still under the protection of the law and may not be forced. And it will be no excuse that she was first taken with her own consent if she were afterwards forced against her will.⁵ If the non-resistance on the part of the woman alleged to have been ravished proceeded merely from her being over-powered, or from her not being able to resist longer; or that from the number of persons attacking her she considered resistance dangerous and absolutely useless, the prisoner ought to be convicted. But if from the whole of the circumstances it appears that although when the alleged ravished woman was laid hold of it was against her will, yet that she did not resist afterwards because she in some degree consented to what was afterwards done to her, the prisoner should be acquitted of the rape and convicted of an assault only.⁶

§ 439. **Circumstances Impairing or Strengthening the Testimony of the Prosecutrix.** — It is important to keep in view the difference between the crime of rape and the sin of seduction, for unfortunately there are some females so frail as to actually seduce or encourage the alleged offender into the commission of the sin of seduction, or allow themselves to be seduced

¹ 1 Phil. Ev., 4th Ed., 762; *R. v. Clark*, 2 Stark. R., 244; *R. v. Aspinwall*, Cit., 3 Stark. Ev., 952; *R. v. Robins*, 2 Moody & R., 512; *People v. Benson*, 6 Cal., 221.

² *People v. Jackson*, 3 Park. Cr. R., 339.

³ 1 Hale, 629; *Pleasant v. State*, 8 Engl. Ark., 389; 15 Ark., 624; *Rex v. Barker*, 3 Car. & P., 589. *Wright v. State*, 4 Humph., 194.

⁴ 1 Hawks P. C. C., 41, § 7; 1 East P. C., 445; 4 Black. Com., 213.

⁵ 1 Hawks P. C. C., 41, § 7; 1 East P. C., 444, 4 Black. Com., 213.

⁶ *Barb. Cr. L.*, 73; *Reg. v. Hallet*, 9 Car. & P., 748, *ante* §435.

though keeping up a show of resistance by saying "no," and meaning yes, and by making such a feeble fight as was calculated to encourage rather than repel the attack, and then from a sense of shame arising from an apprehension of the consequences which may follow the illicit connection, or from the fact that the matter has already become known, or for some other purpose, arraign the supposed offender for the offense of rape. And as there was no express consent she is enabled to swear without any great stretch of conscience as would be necessary when the whole story was a tissue of falsehood from beginning to end;¹ and possibly she may do so, really thinking she has actually been forced and raped, while in fact, under the impulse of the moment she substantially consented. It has been well said by Lord Hale,² and repeated by nearly all the elementary writers upon criminal law since³ that, "the charge of rape is an accusation easily made but difficult to be disproved by the party accused, be he ever so innocent; and therefore, though the party ravished be a competent witness, yet the credibility of her testimony must be determined by the circumstances of the facts that concur with the testimony, if the witness be of good fame; if she presently discovered the offense and made pursuit after the offender; if she showed circumstances and signs of injury whereof many are of that nature that only women are the proper examiners; if the place where the act was done was remote from inhabitants or passengers; if the offender fled, these and the like are concurring circumstances which give greater probability to her evidence. On the other hand, if she be of evil fame and stand unsupported by other evidence; if she conceal the case for any considerable time after she had an opportunity to complain except from fear; if she continues on intimate and friendly terms with the alleged offender after the alleged commission of the

¹ *People v. Hulse*, 3 Hill, 316.

² 1 Hale P. C., 633-635; *State v. Tomlinson*, 11 Iowa, 406.

³ 3 Greenl. Ev., § 212; Black. Com., 213; 1 East P. C., 445; 3 Chitty Cr. L., 812; 3 Stark. Ev., 1267, Roscoe Cr. Ev., 710; 2 Arch. C. P. & Pl., 169.

offense;¹ if the place where the act is supposed to have been committed was near to persons by whom it was probable that she might have been heard, and yet she made no outcry;² if she gave a wrong description of the place, *or person*;³ if she fixed on a place where it was improbable for a man to have access to her by reason of being in a different place or company about that time, these and the like circumstances afford a strong but not conclusive presumption that the testimony is feigned."

§ 440. The Husband Cannot be Guilty of Rape upon his own Wife for the matrimonial consent cannot be retracted, but he may be guilty as principal by assisting another person to commit a rape upon his wife.⁴

14. SODOMY.

§ 441. Provisions of the Statute — Punishment. — "The infamous crime against nature, either with man or beast, shall subject the offender to be punished by imprisonment in the penitentiary for a term not more than ten years."⁵

STATEMENT OF THE OFFENSE OF SODOMY WITH A MAN.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, unlawfully and feloniously did make an assault in and upon one G. H., and then and there feloniously, wickedly and against the order of nature had a venereal affair with the said G. H., and then and there feloniously, carnally knew him⁶ the said G. H., and then and there feloniously, wickedly and against the order of nature, did commit and perpetrate the detestable, abominable, and infamous crime against nature of buggery, with the said G. H., then and there being a male person, contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

¹ Barb. Cr. L., 72; *Barney v. People*, 22 Ills., 160; *Austine v. People*, 51 Ills., 240.

² *State v. Cone*, 1 Jones N. C., 18; *State v. Cross*, 12 Iowa, 66; *People v. Morrison*, 1 Park. Cr. R., 644.

³ *Kennedy v. People*, 44 Ills., 283.

⁴ 1 Hale P. C., 629; *Rex v. Castlehaven*, 1 St. Tr., 387.

⁵ R. S., 359, § 47.

⁶ The allegation of carnal knowledge under the English statute was necessary. 1 Hawks P. C., 357.

STATEMENT OF THE OFFENSE OF SODOMY WITH A BEAST.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, feloniously, wickedly, and against the order of nature had venereal affair with a certain (*cow*), and then and there feloniously, wickedly and against the order of nature did carnally know the said (*cow*), and then and there feloniously, wickedly, and against the order of nature with the said (*cow*), did commit and perpetrate the abominable, detestable and infamous crime against nature of buggery, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 442. Evidence.—The only evidence required is the proof of penetration as in rape.¹ It is not necessary to prove emission to convict any person of the crime against nature.² A man and woman, husband and wife,³ two men or a boy, and a man can commit this offense together.⁴ All aiding and abetting are guilty as principals.⁵ To constitute the offense the act must be in that part where sodomy is committed; therefore the act in a child's month does not constitute the offense.⁶ An unnatural connection with an animal of the fowl kind is not a crime against nature, for the reason that a fowl is not a beast within the meaning of the statute.⁷

¹ 2 Arch. C. P. & Pl., 185.

² R. S., 359, § 48.

³ Reg. v. Jellyman, 8 Car. & P., 604.

⁴ Reg. v. Allen, 1 Den. C. C., 364; 2 Car. & K., 869; Com. v. Snow, 111 Mass., 411.

⁵ 1 Hale P. C., 670; 3 Inst., 59; 1 East P. C. C., 14, § 2.

⁶ Rex v. Jacobs, Russ. & Ry., 331.

⁷ 1 Russ. on C., 698.

SECTION IV.

OFFENSES AGAINST PROPERTY.

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§ 443. Provisions of the Statute as to Arson. — “Every person who shall willfully and maliciously burn or cause to be burned any dwelling-house, kitchen, office, shop, barn, stable, store-house, warehouse, malt-house, stilling-house, factory, mill, pottery or other building, the property of any other person, or any church, meeting-house, school-house, state-house, court-house, work-house, jail or other public building, or any boat or other watercraft, or any bridge of the value of fifty dollars, erected across any of the waters of this state, such person so offending shall be deemed guilty of arson, and upon conviction thereof shall be punished by imprisonment in the penitentiary for a term not less than one year nor more

than twenty years; and should the life of any person be lost in consequence of any such burning, such offender shall be deemed guilty of murder and punished accordingly.”¹

§ 444. **To Defraud Insurer.** — “Whoever willfully and maliciously burns or sets fire to, or causes to be burned, or set on fire, any building, or any goods, wares, merchandise or other chattels which are at the time insured against loss by fire, with intent to injure the insurer, whether such person is the owner of the property burned or not, shall be imprisoned in the penitentiary not less than one nor more than ten years.”²

§ 445. **Of Other Property.** — “Whoever willfully and maliciously burns or causes to be burned any barrack, cock, crib, rick, or stack of hay, corn, wheat, oats, barley, or other grain or vegetable product of any kind, or any pile of coal, wood or other fuel, or any pile of boards, plank, posts, rails or other lumber, or any personal property whatever of another, shall be imprisoned in the penitentiary not less than one nor more than six years.”³

§ 446. **Attempt to Commit.** — “Whoever willfully or maliciously sets fire to, or attempts to set fire to, any of the buildings or other property mentioned in section thirteen and fifteen above,⁴ with intent to burn or destroy the same, shall be imprisoned in the penitentiary not exceeding two years, and fined not exceeding five thousand dollars.”⁵

§ 447. **Of One's Own Property.** — “If the owner or lessee or occupant of any of the buildings or property mentioned in sections thirteen and fifteen⁶ of this act, sets fire or attempts to set fire to or burn the same, with intent to set fire or burn the building or property of another, he shall be deemed guilty as if the property so set on fire or attempted to be set fire to or burned, were owned or occupied by another.”⁷

¹ R. S., 354, § 13; 15 Wis., 14.

² R. S., 354, § 14.

³ Id., § 15.

⁴ *Ante* §§ 443, 445.

⁵ R. S., 354, § 16.

⁶ *Ante* §§ 443, 445.

⁷ R. S., 354, § 17.

§ 448. **Indictment.** — “In any indictment for setting fire to or burning, or attempting to set fire to or burn any building, if the building was occupied, it shall be sufficient to allege the building to be the property of the owner, lessee or occupant thereof; if unoccupied, to allege simply that such building was at the time unoccupied, giving a description thereof in general terms.”¹

STATEMENT OF THE OFFENSE OF ARSON.²

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, feloniously, willfully and maliciously³ did set fire to and⁴ burn⁵ (or “*cause to be set fire to and burned*”) a certain dwelling-house of the value of — dollars,⁶ then and there being the property of another person, *to wit.*, of the said A. B.,⁷

¹ R. S., 354, § 19.

² For a form of an indictment in Iowa, see *State v. Tennery*, 9 Iowa, 436; *State v. Johnson*, 19 Iowa, 230.

³ The words “feloniously, willfully and maliciously” are indispensable. 2 East P. C., 1033; 3 Greenl. Ev., § 51, n. 4; *Com. v. Wade*, 17 Pick., 395; *Killenbeck v. State*, 10 Md., 431; *Jessee v. State*, 28 Missis., 100; *Rex v. Reader*, 4 Car. & P., 245; *Rex v. Turner*, 1 Moody, 239; although in one case it was held that the word “maliciously” was equivalent to the word “willfully” in the statute. *Chapman v. Com.*, 5 Whart., 427.

⁴ The words “set fire to and,” are not in the statute, and probably may be omitted, though usually inserted. 2 Bish. Cr. P., § 46.

⁵ The word “burn” is in the statute and must be used. *Hesler v. State*, 17 Ga., 130; *Cochrane v. State*, 6 Md., 400; *Howell v. Com.*, 5 Grat., 664; although in Maine it has been held that the words “set fire to” were equivalent to the word “burn” in the statute. *State v. Taylor*, 45 Me., 322; *contra*, *Howell v. Com.*, 5 Grat., 664.

⁶ Under a former statute it was held that in an indictment for arson the value of the property burned must be stated. *Clark v. People*, 1 Scam., 117; *Ritchie v. State*, 7 Blackf., 168.

⁷ Formerly it was necessary that the ownership of the house should be correctly stated and proved as stated. 1 Bish. Cr. P., § 573; *Martin v. State*, 28 Ala., 71; *State v. Fish*, 3 Dutcher, 323; *Carter v. State*, 20 Wis., 648; *People v. Myers*, 20 Cal., 761; so as to show it to be the house of another. And it was necessary to allege that it belonged to the person in possession in his own right. *Richie v. State*, 7 Blackf., 168; *Rex v. Rickman*, 2 East P. C., 1034; *Martha v. State*, 2 Ala., 72; *State v. Lyon*, 12 Conn., 487; *State v. Sandy*, 3 Ired., 570; *contra*, *Shepherd v. People*, 19 N. Y., 537; and if it turned out to be in the possession of the tenant, the prisoner could not be convicted. *People v. Gates*, 15 Wen., 159; *contra*, *Shepherd v. People*, 19 N. Y., 537; for during the lease the house was deemed to be the property of

there situate,¹ against the form of the statute in such case made and provided² (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF BURNING A SHOP WITH INTENT TO
INJURE INSURER.

(*Commence as in the form on page 35*) that C. D., on, etc., at, etc., in the said county, feloniously, willfully and maliciously did set fire to and burn a certain building, *to wit.*, a shop, the property of the said C. D., of the value of one thousand dollars, there situate, with the felonious and malicious intent, thereby then and there to injure and defraud a certain incorporated insurance company called (*insert the name of the company*), the said shop, then and there being insured³ against loss by fire by the said company, for the sum of one thousand dollars, contrary to the form of the statute in such case made and provided (*conclude as in the form on page 35*).

STATEMENT OF THE OFFENSE OF AN ATTEMPT TO COMMIT ARSON.

(*Commence as in the form on page 35*) that C. D., on, etc., at, etc., in said county, feloniously, willfully and maliciously did set fire⁴ to a certain building, *to wit.*, a certain barn of the said A. B., of the value of ——— dollars, there situate, with intent thereby then and there feloniously, willfully and maliciously to burn and destroy the said barn,⁵ contrary to the form of the statute in such case made and provided (*conclude as in the form on page 35*).

§ 449. Evidence of Arson — 1. An Actual Burning must be

the tenant. Foster, 115; 4 Black. Com., 221; but now this matter is changed somewhat by statute. R. S., 354, § 19, *ante* § 448.

¹ It has been held that the words "there situate" are necessary in an indictment and a sufficient statement of the venue. *State v. Gaffrey*, 4 Chand., 163, 165; *State v. Reed*, 20 Iowa, 417; *contra*, *Rex v. Napper*, 1 Moody, 44; *Com. v. Lamb*, 1 Gray, 493; and see *Com. v. Barney*, 10 Cush., 480; *State v. Price*, 6 Halst., 233.

² If the building was not a dwelling-house or an out-house the indictment must conclude against the statute, for in such case the offense was not a felony at common law. *Chapman v. Com.*, 5 Whart., 427; *State v. Ladd*, 2 Swan Tenn., 226.

³ It is necessary to allege that the property was insured. *People v. Henderson*, 1 Park. Cr. R., 561; under the former statute this was not necessary. *McDonald v. People*, 47 Ills., 533.

⁴ The particular manner in which the attempt was made need not be alleged. *People v. Bush*, 4 Hill, 133; and it is not necessary to describe the combustible materials used for the purpose. *Com. v. Flynn*, 3 Cush., 529.

⁵ It is not necessary to negative the commission of the offense; 2 Arch. C. P. & Pl., 30; Cald., 400.

Proved.¹—But the burning and consuming any part of the building is sufficient, though the fire be afterwards extinguished² or go out itself.³ As where upon an indictment for this offense it appeared that the wood of the floor had been charred in a trifling manner, and had been at a red heat but not in a blaze, this was held to be a sufficient burning within the statute.⁴ So the charring of the floor to the depth of half an inch was held to be a sufficient burning to complete the offense of arson,⁵ or if any of the fibres of the wood are wasted by the fire the offense of arson is complete, and it is immaterial how small a quantity is consumed.⁶ It is not necessary that any flames should be visible.⁷ But an attempt to set fire to a building by putting combustible materials and fire into it, though the combustibles themselves are consumed and the boards of the floor are scorched black,⁸ if no part of the building is burned, is not arson either at common law or by our statute.⁹ Whether a building has been so affected by fire as to constitute a burning, is a question of fact for the jury, to be determined by the evidence.¹⁰

§ 450. **Night-Time — Presumption from Possession of Goods — Confessions — Threats — Building not Finished.**—If the burning is charged to have been done in the night-time, the allegation is immaterial and need not be proved.¹¹ Actual participation in the crime may be shown by the guilty possession of goods

¹ 3 Inst., 66; 3 Chitty Cr. L., 1120; *People v. Cottelal*, 18 John., 115.

² 4 Black. Com., 222; *Rex v. Stallion*, R. & M., 397; *Com. v. Shaack*, 16 Mass., 105; *People v. Rose*, 16 John., 203; *Com. v. Belton*, 5 Cush., 427; *Hesler v. State*, 17 Ga., 130; *Com. v. Tucker*, 110 Mass., 403.

³ 3 Inst., 66; 1 Hawks P. C. C., 39, §§ 16, 17; 1 Hale, 568, 569; *Com. v. Shaack*, 16 Mass., 105.

⁴ *Reg. v. Russel C. & M.*, 541; *Reg. v. Parker*, 9 Car. & P., 45.

⁵ *State v. Sandy*, 3 Ired., 570.

⁶ *State v. Mitchel*, 5 Ired., 350.

⁷ *R. v. Stallion*, R. & M. C. C. R., 393.

⁸ *Reg. v. Russel, C. & M.*, 541; *State v. Sandy*, 3 Ired., 570.

⁹ 3 Inst., 66; 4 Black. Com., 222; 1 Hale P. C., 568; *Com. v. Shaack*, 16 Mass., 105; *People v. Butler*, 16 John., 203.

¹⁰ *Com. v. Belton*, 5 Cush., 427.

¹¹ *Rex v. Minton*, 2 East P. C., 1021.

proved to have been in the building at the time of the act done, even though such possession may amount to another felony.¹ To prove the burning of the property, evidence of confessions² and threats³ are admissible as in other cases. A building need not be completed to make it the subject of the offense of arson.⁴

§ 451. 2. The Building or Structure must be Proved to be the Property of Another or to Belong to the Public.⁵—Formerly a lessee from month to month⁶ or for ever so short a time,⁷ or a tenant at sufferance,⁸ or an occupant having the legal right to the possession,⁹ as a mortgagor in possession, though the mortgage divested him of his legal title¹⁰ or otherwise, could not be guilty of arson by burning the premises.¹¹ But under our statute such lessee, or occupant it is presumed, will be held guilty of arson if he burns such building or structure with intent to burn the property of another,—that is of his lessor or of the actual owner of the premises burned¹² or the property adjoining, owned by another.¹³ So if the owner of a building sets fire to it with intent to burn an adjoining house

¹ *Rex v. Rickman*, 2 East P. C., 1034.

² *Com. v. Ingraham*, 7 Gray, 46; *Reg. v. Sleeman*, Dears, 249; 6 Cox. C. C., 245; *Rex v. Long*, 6 Car. & P., 179; *Reg. v. Hearn*, C. & M., 109; *Reg. v. Taylor*, 8 Car. & P., 733; *Sam v. State*, 33; *Missis.*, 347.

³ *Com. v. Goodman*, 14 Gray, 55.

⁴ *Com. v. Squire*, 1 Met., 258; *contra*, *State v. McGovern*, 20 Conn., 245.

⁵ R. S., 354, § 13; 1 Hale P. C., 568; 2 East P. C., 1027; *Rex v. Proberts*, 2 East P. C., 1030; *Rex v. Spalding*, 1 Leach, 218; *People v. Henderson*, 1 Park. Cr. R., 560; *People v. Gates*, 15 Wen., 159; *Bloss v. Tobey*, 2 Pick., 320.

⁶ *Rex v. Pedley*, 1 Leach, 242, Cald., 218; *McNeal v. Woods*, 3 Blackf., 485; *Rex v. Holmes*, Cro. Car., 376; 1 Hawks P. C., 136, § 710.

⁷ 2 Bish. Cr. L., § 13; 2 East P. C., 1029.

⁸ *Sullivan v. State*, 5 Stew. & P., 175; *Rex v. Spaulding*, 1 Leach, 218.

⁹ *Rex v. Breeme*, 1 Leach, 220; 2 East P. C., 1026.

¹⁰ *Rex v. Spaulding*, 1 Leach, 218, 2 East P. C., 1023, 1025; *Rex v. Holmes*, Cro. Car., 376; *Rex v. Pedley*, 1 Leach, 242; *Rex v. Scholfield*, Cald., 397.

¹¹ 2 Bish. Cr. L., § 13.

¹² R. S., 354, §§ 17, 19; *Shepherd v. People*, 19 N. Y., 537.

¹³ R. S., 354, § 17; 1 Hale P. C., 568; *People v. Henderson*, 1 Park. Cr. R., 651; *Rex v. Isaac*, 2 East P. C., 1031; *Rex v. Probert*, 2 East P. C., 1030.

belonging to another, he is guilty of arson.¹ It has been held that the wife does not commit this offense by burning the building of her husband.²

§ 452. **Evidence of Property in Another.** — Proof that another was in the actual occupancy and in the peaceable possession of the building burned at the time of the burning is sufficient evidence of the property in another, and it is not necessary that the reversionary interest should be in the occupant; for it is the right of present possession which constitutes the ownership required by law. Therefore if the lessor being the general owner of the building, burns it while it is occupied by the lessee, he is guilty of arson.³ So this crime may be committed by one entitled to dower in a building⁴ which has not been assigned.⁵ But a servant who merely dwells within the building while the legal possession remains in another, commits the offense when he maliciously burns it.⁶

§ 453. **Burning One's Own Building.** — The burning one's own building, the owner being also the occupant and in possession, does not amount to the crime of arson;⁷ unless with intent to set fire and burn the building or property of another,⁸ though at common law it was a great misdemeanor, if it was so near to other houses as to create danger to them;⁹ and our statute makes it a criminal offense if done with intent to injure an insurer.¹⁰

¹ R. S., 354, § 17, 1 Hale P. C., 568; 2 East P. C., 1031; *Gage v. Sheldon*, 3 Rich., 242.

² *Rex v. March*, 1 Moody, 182.

³ *People v. Van Blaricum*, 2 John., 105; *State v. Lyon*, 13 Conn., 487; *Rex v. Wallis*, 1 Moody C. C., 344; *Ritchie v. State*, 7 Blackf., 168; *State v. Tool*, 29 Conn., 342; *Com. v. Dailey*, 110 Mass., 503.

⁴ *Rex v. Harris, Foster*, 113-115; 2 East P. C., 1023; *Sullivan v. State*, 5 Stew. & Por., 175; *Sweetapple v. Jessee*, 5 B. & Ald., 27; *Com. v. Erskine*, 8 Grat., 624.

⁵ *Rex v. Harris, Foster*, 113-115.

⁶ *Rex v. Gowen*, 2 East P. C., 1027; *Rex v. Reckman*, 2 East P. C., 1034.

⁷ *Erskine v. Com.*, 8 Grat., 627; *Bloss v. Tobey*, 2 Pick., 320.

⁸ R. S., 354, § 17.

⁹ 1 Hale P. C., 567, 568; 4 Black. Com., 231; 2 East P. C., 1027, 1030; *Bloss v. Tobey*, 2 Pick., 325.

¹⁰ R. S., 354, § 14; *McDonald v. People*, 47 Ills., 533; *State v. Elder*, 21 La An., 157; *People v. Schwartz*, 32 Cal., 160; *People v. Hughes*, 29 Cal., 237.

§ 454. **Variance.**—The evidence of ownership must correspond with the allegation in the indictment, or the variance will be fatal,¹ except in the cases provided for by statute.² An allegation that the building burned was “called a barn” is sustained by proof that the structure burned, though but an out-building, used solely for sheltering cattle, was in fact called and known as a barn by the people in that vicinity.³

§ 455. 3. **It must be Proved that the Burning was Willful and Malicious.**⁴—Therefore the accidental or negligent burning of another’s property, though it occur in doing an unlawful act, as shooting at poultry or game, is not arson,⁵ unless done in committing a felony, as if he intended to steal the poultry or game, for if the first intent be felonious, the party must abide all of the consequences.⁶ The malice, however, in this case, as in many others, does not merely imply a design to injure the party who is eventually the sufferer, but an evil and malicious intention, however general, producing damage to individuals.⁷ So the willful and malicious burning need not correspond with the precise intent or design of the party.⁸ For if a man design feloniously to burn one house, and by mistake or accident the flames destroy another instead of the one intended, he will be guilty of willfully and maliciously

¹ *Rex v. Rickman*, 2 East P. C., 1034; *Rex v. Pedley*, 2 East P. C., 1026; *People v. Slater*, 5 Hill, 401; *Com. v. Wade*, 17 Pick., 395; *State v. Lyon*, 12 Conn., 487.

² R. S., 354, § 19; and see *Com. v. Harney*, 10 Met., 422.

³ *State v. Smith*, 28 Iowa, 565.

⁴ 1 Hale P. C., 569; 3 Inst., 67; 4 Black. Com., 222; 2 East P. C., 1033; *Jesse v. State*, 28 Missis., 100; *State v. Johnson*, 19 Iowa, 234.

⁵ 3 Inst., 67; 2 East P. C., 1019; 4 Black. Com., 222; 1 Hale P. C., 569; *State v. Mitchell*, 5 Ired., 350.

⁶ *Foster*, 258, 259; 2 Arch. C. P. & Pl., 724; 2 East P. C., 1019; *Brennan v. People*, 15 Ills., 516.

⁷ 3 Chitty Cr. L., 1120.

⁸ 2 Arch. C. P. & Pl., 724; 3 Inst., 67; 3 Greenl. Ev., § 56; 1 Hawks P. C. C. 39, § 19.

burning the latter,¹ even if the house intended escape.² So it has been held that if a person set fire to a stack, the fire from which is likely to communicate to a barn, and it does so, and the barn is burned, he is in point of law indictable for burning the barn.³ But it has been held that if a prisoner in a jail sets fire to it, with a design of merely burning a hole through to effect his escape, and not of burning it down for that purpose, this is not arson.⁴ Malice will be inferred from the act of burning.⁵

§ 456. **Evidence of Intent to Injure Insurer.** — Under a former statute it was held that when the intent to injure the insurer existed, it was immaterial whether the policy on the building attempted to be destroyed was valid or not;⁶ but under the present statute, making the burning an offense only when the building is insured at the time, the courts will probably hold that it is necessary that there should be a valid policy of insurance on the building burned at the time of the burning.⁷ And it must appear that the defendant knew of the existence of the insurance, since this is a necessary ingredient in the offense.⁸

§ 457. **Evidence of Attempts** to solicit another to commit the offense of arson, and especially to furnish him with materials to perpetrate such an offense, though the one soliciting did not intend to be present, and the offense is not in fact committed is indictable as an attempt.⁹ So is the burning of one's own house with intent thereby to consume the house of another, though the others be not in fact burned.¹⁰ Where an

¹ *McDonald v. People*, 47 Ills., 533.

² *Rex v. Gilson, Russ. & Ry.*, 138.

³ *Martin v. State*, 28 Ala., 71.

⁴ *Hale P. C.*, 569; 1 *Hawks P. C. C.*, 39, § 5; 3 *Chitty Cr. L.*, 112; 2 *East P. C.*, 1019.

⁵ 2 *Arch. C. P. & Pl.*, 724.

⁶ 1 *Hale*, 569; 3 *Inst.*, 67; 1 *Hawks P. C. C.*, 3, § 19; *Rex v. Cooper*, 5 *Car. & P.*, 553; *Reg. v. Price*, 9 *Car. & P.*, 729.

⁷ *People v. Cotteral*, 18 *John.*, 115; *State v. Mitchell*, 5 *Ired.*, 350.

⁸ *Rex v. Farrington, Russ. & Ry.*, 207.

⁹ *People v. Bush*, 4 *Hill*, 133; *Reg. v. Clayton*, 1 *Car. & K.*, 128.

¹⁰ *R. v. Holmes*, *Cro. Car.*, 376, *W. Jones*, 351.

indictment alleges that the defendant attempted to set fire to a dwelling-house with intent to burn it by attempting to set fire to another building, the jury are authorized to infer the alleged intent from the evidence respecting the attempt to set fire to the other building.¹

2. BURGLARY.

§ 458. **Provisions of the Statute — Definition and Punishment.** — “Whoever in the night time, willfully and maliciously and forcibly breaks and enters, or willfully and maliciously without force (the doors or windows being open) enters into any dwelling-house, kitchen, office, shop, store, house, warehouse, malt-house, stilling-house, mill, pottery, factory, water-craft, freight or passenger railroad car, church, meeting-house, or any other building, with the intent to commit murder, robbery, rape, mayhem, larceny or other felony, shall be deemed guilty of burglary, and be imprisoned in the penitentiary for a term not less than one year nor more than twenty years.”²

§ 459. **Attempt to Commit.** — “Whoever shall attempt to break and enter in the night time, any building, ship, or vessel, with intent to commit the crime of murder, rape, robbery, larceny or other felony, shall be imprisoned in the penitentiary not less than one nor more than five years.”³

§ 460. **Burglar Found in Building.** — “Whoever is found in any building, ship or vessel, with intent to commit the crime of murder, rape, robbery, larceny or other felony, shall be imprisoned in the penitentiary not less than one year nor more than five years.”⁴

§ 461. **Having Burglars' Tools.** — “Whoever is found having any pick-lock, crow, key, bit, or other instrument or tool, with intent to break and enter any building, ship or vessel, with intent to commit the crime of murder, rape, robbery,

¹ *Com. v. Harney*, 10 Met., 422.

² R. S., 357, § 36; *Bell v. State*, 20 Wis., 599.

³ R. S., 357, § 37.

⁴ *Id.*, § 38.

larceny or other felony, shall be imprisoned in the penitentiary not less than one nor more than two years."¹

STATEMENT OF THE OFFENSE OF BURGLARY.

(*Commence as in form on page 35*) that C. D., on the — day of —, A. D. 18—, about the hour of eleven, in the night time of the same day,² at the town of — in the said county of — and state of Illinois, feloniously,³ burglariously,⁴ willfully, maliciously, and forcibly⁵ did break and enter⁶ the dwelling⁷

¹ R. S., 357, § 39.

² The words "in the night time" are necessary. *State v. Seymour*, 36 Me., 225; *Lewis v. State*, 16 Conn., 32; *State v. G. S.*, 1 Tyler, 295; *Com. v. Marks*, 4 Leigh, 658; *Thompson v. Com.*, 4 Leigh, 652; and in an indictment at common law it was necessary to state the hour of the night. 1 Hale P. C., 551; 2 East P. C., 513; 1 Chitty Cr. L., 218, 244; *State v. G. S.*, 1 Tyler, 295; *Rex v. Waddington*, 2 East P. C., 513; *contra*, 1 Whart. Cr. L., 270; *Com. v. Williams*, 2 Cush., 582; *People v. Burgess*, 35 Cal., 115; though it need not be proved as laid; 1 Hale P. C., 549; 2 Bish. Cr. P., 131. The words "about the hour of eleven" are a sufficient statement of the hour. *State v. Seymour*, 36 Me., 225; see *State v. Mather*, N. Chip, 32.

³ At common law the word "feloniously" was necessary. 1 Hawks P. C., C., 38, § 38; 2 Arch. C. P. & Pl., 264; 1 Chitty Cr. L., 172; *Stuart v. Com.*, 12 Serg. & R., 177.

⁴ At common law the word "burglariously" was necessary. 2 Arch. C. P. & Pl., 264; 2 Hawks P. C., § 55; 2 Hale P. C., 184; 1 Hale P. C., 549, 550; 4 Co., 39b; 1 Chitty Cr. L., 242; *contra*, *Tully v. Com.*, 4 Met., 357.

⁵ The words "willfully, maliciously and forcibly" are contained in the statute and should not be omitted.

⁶ The words "break and enter" must both be inserted. 1 Hale P. C., 550. Unless it is alleged that the door or window was open. R. S., 357, § 36; then the word forcibly should be omitted.

⁷ The word "house" was formerly held insufficient without adding the word "dwelling." 4 Black. Com., 225; 1 Hale P. C., 550; 3 Chitty Cr. L., 1109. But under our statute, making it burglary to enter any building, the word "house," omitting the word "dwelling," would probably be sufficient. It is sufficient to describe the building as a "mansion-house," which has been held to be a sufficient averment that it is a dwelling-house. *Com. v. Pennock*, 3 Serg. & R., 199; and in New York, it has been held that the word "house" was a sufficient description of a dwelling-house. *Thompson v. People*, 3 Park. Cr. R., 208. As a general rule the same word should be used in an indictment to describe the building entered, as is employed in the statute defining the offense. *Com. v. Tuck*, 20 Pick., 356; *Larned v. Com.*, 12 Met., 240; *Devoc v. Com.*, 3 Met., 316; *Evans v. Com.*, 3 Met., 453; *Phillips v. Com.*, 3 Met., 588. In the state of Wisconsin the words "the dwelling-house of A," were held a sufficient averment, that such building

house of the said A. B.,¹ there situate,² with intent then and there³ therein feloniously⁴ and burglariously to steal,⁵ take and carry away divers

was A's place of residence and that he occupied it as such at the time laid. *Bell v. State*, 20 Wis., 599.

¹ It is necessary to aver and set out the name of the owner of the building if known, if not known, then it should be so stated. *State v. Morrissey*, 22 Iowa, 158, Com. v. Perris, 108 Mass., 1. An error in not stating the name of the owner to a common intent in an indictment would be fatal. *Rex v. White*, 1 Leach, 252; 2 East P. C., 513, 730; *Reg. v. Cranage*, 1 Salk. 385; *R. v. Cole*, Moor, 466. The allegation that the defendant broke and entered the city hall of Charlestown, sufficiently avers the ownership of the property. *Com. v. Williams*, 2 Cush., 583. It is enough if the person in possession and occupancy of the building is named as the owner. *Markman v. State*, 25 Ga., 52; *People v. Van Blaricum*, 2 John., 105; *People v. Smith*, 1 Park. Cr. R., 329; *Ducher v. State*, 18 Ohio, 308; *Houston v. State*, 38 Ga., 165; *Com. v. Dailey*, 110 Mass., 503.

² According to the English decisions the particular town, ville or ward must be laid correctly in an indictment. 2 Arch. C. P. & Pl., 265. And it was held in the city of New York, that a variance in the number of the ward was fatal. *People v. Carney*, 3 City Hall Rec., 44; *Norris House*, 3 Greene Iowa, 513; but in Ohio it has been held that a description of the premises as "the warehouse of W. M., at Sciota county" was sufficient. *Spencer v. State*, 13 Ohio R., 401; *State v. Reed*, 20 Iowa, 418; *State v. Crogan*, 8 Iowa, 523.

³ The words "then and there" may be omitted. *Com. v. Doherty*, 10 Cush., 52; and see *Jackson v. People*, 18 Ills., 269.

⁴ Necessary. 1 Hale P. C., 559; 2 Leach, 717; 3 Chitty Cr. L., 1113; *Curtis v. People*, Bre., 197; 2d Ed., 256; 1 Scam., 285; *Conolly v. People*, 3 Scam., 474; argument in *Clark v. People*, 1 Scam., 118; *contra*, *Com. v. Brown*, 3 Rawle, 207; *Jones v. State*, 11 N. H., 46; and see *Perry v. People*, 14 Ills., 497.

⁵ The felonious intent and species of felony intended must be correctly stated and proved as alleged. 1 Hale, 561; 3 Chitty Cr. L., 1114; *State v. Lockhart*, 24 Ga., 420; *Portwood v. State*, 29 Texas, 47. And an allegation of an intent to commit one felony will not be supported by proof of an intent to commit another. 2 East P. C., 514; 1 Hale P. C., 561; *Rex v. Dingley*, 2 Leach, 840. But different intents may be averred in different counts in the same indictment. *Rex v. Thompson*, 2 East P. C., 515; 3 Chitty Cr. L., 1113; *State v. Eaton*, 3 Harring., 554. An averment of a general intent to steal. *Joslyn v. Com.*, 9 Met., 236; *contra*, *People v. Murray*, 8 Cal., 519, or "with intent to commit the crime of larceny." *Id.*, *State v. Jones*, 10 Iowa, 206; or commit a rape, *Com. v. Doherty*, 10 Cush., 52, has been held a sufficient allegation of intent, even in an indictment, without alleging the facts constituting the felony intended to be committed in technical language.

goods and chattels¹ of the said A. B.,² then and there being in the said dwelling-house, (and the said C. D. then and there in the said dwelling-house, feloniously and burglariously did steal,³ take and carry away one gold watch of the value of one hundred dollars, the goods and chattels of the said A. B.,⁴ then and there being found in the said dwelling-house) (*conclude as in form on page 35*).

§ 462. Evidence. — 1. Both the Breaking and Entering must be Proved to Have been Done in the Night-time; but it is not essential that both be done in the same night.⁵ And it is night in the sense of the law when there is not daylight enough to dis-

¹ The words "goods and chattels" imply a value. *Spencer v. State*, 13 Ohio, 401; *Com. v. Williams*, 2 Cush., 583; *Spears v. State*, 2 Ohio N. S., 583; and the statement of the kind or value of the goods is necessary; *Hunter v. State*, 29 Ind., 80; *Spencer v. State*, 13 Ohio, 401; *contra*, *People v. Murray*, 8 Cal., 519; and is usually omitted; 3 Chitty Cr. L., 1118; *Conolly v. People*, 3 Scam., 478. Proof of their value on the trial is not necessary. *Spencer v. State*, 13 Ohio, 401.

² The ownership of the goods must be correctly stated as in larceny. 3 Chitty Cr. L., 1118, n. c. And if the proof shows that the goods belonged to another, the defendant must be acquitted. *Rex v. Jenks*, 2 East P. C., 514. But where an indictment alleged the intent to be generally the goods and chattels in the said dwelling-house, then and there being, to steal, and charged the defendant with stealing the goods of A therein, it was held to be satisfied by proof of a breaking into the house with intent to steal the goods there generally, though the goods actually stolen did not belong to A alone. *Reg. v. Clark*, 1 Car. & K., 421.

³ The statement that the larceny was actually committed, contained within the brackets, may be omitted, as the offense of burglary is complete without such statement. 1 Hale P. C., 560; *R. v. Furnival*, Russ. & Ry., 445; *Rex v. Vandercomb*, 2 East P. C., 514; *R. v. Watkins* C. & M., 264; *State v. Henley*, 30 Mo., 509; and the addition of such statement does not make an indictment bad for duplicity. *Com. v. Tuck*, 20 Pick., 356; *State v. Brady*, 14 Vt., 353; *Stoops v. Com.*, 7 Serg. & R., 491; *State v. Squires*, 11 N. H., 37; 12 N. H., 42; *Com. v. Hope*, 22 Pick., 1; nor does it affect the validity of an indictment if on examination the allegation of larceny or other offense is found to be defective. *Larned v. Com.*, 12 Met., 240.

⁴ Where the indictment avers that the defendant broke and entered the dwelling-house of one person with intent to steal his goods, and having so entered then and there stole and carried away the goods of another person then and there being found, there is no misjoinder of offenses. *State v. Brady*, 14 Vt., 353.

⁵ R. S., 357, § 36; Hale P. C., 551; 4 Black. Com., 226; Russ. on C., 417; *State v. Whit*, 4 Jones N. C., 349; *State v. Bancroft*, 10 N. H., 105; *Rex v.*

cover a man's face.¹ The time of entry may be shown by circumstantial evidence like other facts.² Where the entry is through a brick wall into the vault of a bank, any breaking and entering at night is sufficient, though the entry was not fully consummated until after daylight.³

§ 463. 2. It must be Proved that the Defendant Forcibly Broke and Entered the Building⁴ unless the doors or windows were open.⁵ Probably the word "forcibly" in the statute requires no more force to be used than was required at common law to commit a trespass.⁶ Therefore, a forcible breaking may be by lifting a latch and opening the door;⁷ picking, turning back or opening the lock with a false key or other instrument;⁸ removing or breaking a pane of glass and inserting the hand or even, a finger;⁹ pulling up or down any unfastened sash;¹⁰ removing the fastening of a window by inserting the hand through a broken pane;¹¹ cutting and tearing down a netting of twine

Jordan, 7 Car. & P., 432; Reg. v. Bird, 9 Car. & P., 44; R. v. Smith, Russ. & Ry., 117; Rex v. Segar, Comb., 401; Lewis v. State, 16 Conn., 32; Reg. v. Polley, 1 Car. & K., 77.

¹ 3 Inst., 63; 3 Chitty Cr. L., 1105; 2 Arch. C. P. & Pl., 308; State v. Bancroft, 10 N. H., 105; Com. v. Chevalier, 7 Dana, 134; *contra*, Thomas v. State, 5 How. Missis., 20.

² State v. Bancroft, 10 N. H., 105.

³ Com. v. Glover, 111 Mass., 395.

⁴ Roscoe Cr. Ev., 340; 3 Chitty Cr. L., 1106; 4 Black. Com., 226; Rex v. Hughes, 1 Leach, 406, 2 East P. C., 491; Anonymous, J. Kel., 67; Com. v. Shupney, 105 Mass., 588.

⁵ R. S., 357, § 36.

⁶ Croff v. Ballinger, 18 Ills., 203; Smith v. Hoag, 45 Ills., 251; Reeder v. Purdy, 41 Ills., 279; Ducher v. State, 18 Ohio, 308; *contra*, People v. Bush, 3 Park. Cr. R., 552; Com. v. Trimmer, 1 Mass., 476; Rex v. Paine, 7 Car. & P., 135.

⁷ 3 Greenl. Ev., § 76; 1 Hale P. C., 552; 2 East P. C., 487; 3 Chitty Cr. L., 1093; 2 Bish. Cr. L., § 97; State v. Reid, 20 Iowa, 421; Curtis v. Hubbard, 1 Hill, 238; Rex v. Gray, 1 Stra., 481; *contra*, People v. Bush, 3 Park. Cr. R., 558; People v. Fralick, Hill & Denio, 63.

⁸ 1 Hale P. C., 552; Russ. on C., 783; Pugh v. Griffith, 7 Ad. & El., 827.

⁹ Rex v. Davis, Russ. & Ry., 499; Rex v. Perkins, 1 Car. & P., 300; Reg. v. Bird, 9 Car. & P., 44.

¹⁰ Rex v. Haines, Russ. & Ry., 451.

¹¹ Rex v. Robinson, 1 Moody C. C., 327.

nailed over an open window;¹ pushing open a window which moved on hinges and was fastened by a wedge;² thrusting himself down chimney;³ breaking open an inner door after having entered through an open door or window,⁴ or by the like acts.⁵ The breaking must be such as will afford the burglar an opportunity of entering so as to commit the intended felony.⁶ Procuring the door to be opened by a fraud practiced on the occupant,⁷ is a breaking of the building within the meaning of the statute.⁸ If a guest in a hotel leaves his own room and breaks into the room of another guest, for the purpose of committing a felony there, he commits burglary.⁹

§ 464. Entry. — An entry is required as well as a breaking.¹⁰ It is not necessary that the whole body should be introduced into the building to make the entry complete.¹¹ Any the least entry, either with the whole or any part of the body,¹² finger,¹³ hand¹⁴ or foot,¹⁵ or with any instrument¹⁶ or weapon¹⁷ introduced for the purpose of committing any of the crimes

¹ *Com. v. Stephenson*, 8 Pick., 354; *Hunter v. Com.*, 7 Grat., 641

² *Rex v. Hall, Russ. & Ry.*, 355.

³ *Donoho v. State*, 36 Ala., 281; *Reg. v. Brice, Russ. & Ry.*, 450.

⁴ 2 East P. C., 488; 1 Hale P. C., 524, 554; *Rex v. Johnson*, 2 East P. C., 488; *State v. Wilson, Coxe*, 439, 441.

⁵ 2 Bish. Cr. L., § 91.

⁶ Barb. Cr. L., 97; *Rex v. Hughes*, 1 Leach. C. C., 406, 2 East P. C., 491.

⁷ *Fisher v. State*, 43 Ala., 17; *Rex v. Hughes*, 1 Leach., 406, 2 East P. C., 491.

⁸ *State v. Johnson, Phillips*, 186.

⁹ 2 Hale P. C., 354; anonymous, 1 Hale P. C., 554, J Kel., 67; *Rex v. Johnson*, 2 East P. C., 488; *State v. Clark*, 42 Vt., 629.

¹⁰ 3 Chitty Cr. L., 1108.

¹¹ 3 Inst., 64; 4 Black. Com., 227; *Rex v. Swallow*, 2 Russ. C. & M., 10; *State v. McCall*, 4 Ala., 643.

¹² 3 Chitty Cr. L., 1108.

¹³ *Rex v. Davis, Russ. & R.*, 499.

¹⁴ *Gibbon's Case, Foster*, 107; Anonymous, 1 Anderson, 115; *Rex v. Perkes* 1 Car. & P., 300; *Robert's Case*, 2 East P. C., 487; *Rex v. Bailey, Russ. & R.*, 341, 1 Moody, 23.

¹⁵ Barb. Cr. L., 98.

¹⁶ *Roscoe Cr. Ev.*, 346; 3 Inst., 64.

¹⁷ 1 Hale P. C., 555; 1 Hawks P. C. C., 38, § 11; 2 East P. C., 90.

enumerated in the statute, or other felony, will be sufficient.¹ As by putting in the hand to take out a watch or other thing within reach.² So putting in a hook or other instrument to hook or reach out things, with intent to steal,³ or a pistol with intent to kill, is a sufficient entry though the hand is not in.⁴ But if the instrument were inserted, not for the purpose of stealing or committing a felony, but for the purpose of completing the breaking and thereby effecting an entrance to commit the intended felony, such insertion is not a sufficient entry to make the offense of burglary complete.⁵ Shooting through the window with intent to commit the offense of mayhem or murder, is in all probability a sufficiently forcible entry to make the offense burglary.⁶ And an entry down a chimney is a sufficient entry into a house.⁷ So if after breaking open the building the thief sends in a child of tender age to bring out the goods, he is guilty of burglary.⁸ So where several come to commit a burglary and some stand to watch in an adjacent place, and others enter and steal, the act of one is the act of all and all, are equally guilty of burglary.⁹

§ 465. 3. It must be Proved that the Defendant Broke and entered the Building Described in the Complaint or Indictment. — Formerly burglary could only be committed by breaking and entering another mansion or dwelling-house,¹⁰ or in a church;¹¹ but under the present statute the offense may be committed by breaking and entering any building.¹²

¹ 2 Whart. Cr. L., §§ 1549–1554.

² Gibbon's Case, Foster, 107; 2 East P. C., 490.

³ Roscoe Cr. Ev., 346; 2 Black. Com., 237; 3 Inst., 64; Anonymous, 1 Hale P. C., 553.

⁴ Id., 2 Bish. Cr. L., § 92.

⁵ 3 Inst., 64; 1 Hawks P. C. C., 132, §§ 11, 12; Rex v. Hughes, 1 Leach, 406; 2 East P. C., 491; Rex v. Rust., 1 Moody C. C., 183.

⁶ 2 Bish. Cr. L., § 94; 3 Chitty Cr. L., 1108; 1 Hawks P. C. C., 38, § 11; 2 East P. C., 490; *contra*, 1 Hale P. C., 555.

⁷ Rex v. Brice, Russ. & Ry., 450.

⁸ 1 Hale P. C., 555, 556.

⁹ 3 Inst., 63; 2 East P. C., 486; 1 Hale P. C., 439.

¹⁰ 3 Greenl. Ev., § 79.

¹¹ 2 Bish. Cr. L., § 105; Reg. v. Baker, 3 Cox C. C., 581.

¹² R. S., 357, § 36.

§ 466. **Ownership.**—The ownership of the building must be proved as laid.¹ If alleged to belong to A. B. and C. D., partners, it is not sufficient to prove the ownership to be in B. and D. partners, but the Christian names of the partners must be shown.² As a general rule the person in the actual possession and occupancy of the building as against a burglar will be deemed to be the owner,³ and the tenure by which the occupier holds the premises will not be inquired into. It is enough that it was his actual dwelling at the time.⁴ And though the possession is not lawful as against a person claiming title, still if the occupant is in actual and peaceable possession the ownership may be laid in him.⁵ Formerly the husband was deemed to be the owner of the dwelling-house occupied by the wife, even though he did not live with or provide for her,⁶ but it is presumed that under the present law it would be sufficient in such case to lay the ownership of the house in the wife.⁷ Where the master occupies the building of his servant the ownership should be alleged to be in the master,⁸ but if the servant occupies the building in his own right and not in the right of his master, the ownership should be alleged to be in the servant.⁹

§ 467. **Tools.**—After proving that a burglary has been committed, then evidence may be received connecting the prisoner with the burglary and with the tools.¹⁰ For this purpose it

¹ *Rex v. White*, 1 Leach, 252; 2 East P. C., 513, 780; *Reg. v. Carnage*, 1 Salk., 385.

² *Doan v. State*, 26 Ind., 495.

³ *Markham v. State*, 25 Ga., 52.

⁴ *People v. Blarcum*, 2 John., 105; *People v. Smith*, 1 Park. Cr. R., 329.

⁵ *Houston v. State*, 38 Ga., 165.

⁶ *Rex v. Farre*, J. Kel., 43; *Boggett v. Frier*, 11 East, 301; *Rex v. Smyth*, 5 Car. & P., 201; *Rex v. French*, Russ. & Ry., 491; *Rex v. Wilford*, Russ. & Ry., 517; *Com. v. Dailey*, 110 Mass., 503.

⁷ *Ducher v. State*, 18 Ohio, 308.

⁸ *Rex v. Stock*, 2 Taunt., 339, 2 Leach, 1015, Russ. & Ry., 185; *Rex v. Rawlins*, 7 Car. & P., 150; *Rex v. Picket*, 2 East P. C., 501.

⁹ *Rex v. Jarvis*, 1 Moody, 7; *Rex v. Smyth*, 5 Car. & P., 201; *Rex v. Jobling*, Russ. & Ry., 525; *Rex v. Camfield*, 1 Moody, 42.

¹⁰ *People v. Winters*, 29 Cal., 658; *State v. Reed*, 20 Iowa, 420.

is competent to show that the implements used in committing the offense came from the prisoner's home,¹ or that burglarious tools and implements were found in the possession of the defendant at the time of his arrest.² And such tools and implements may be brought into court and exhibited to the jury, even though only a part of them were adapted to the commission of the particular offense.³

§ 468. **Stolen Goods.** — Evidence that goods stolen from the building at the time the burglary was committed were found in the possession of the defendant is pertinent.⁴

§ 469. **4. Both the Breaking and Entry must be Shown to have been Done Willfully and Maliciously and with the Felonious Intent Charged.**⁵ — These are usually proved by the circumstances connected with each case.⁶ Evidence that the felony was actually committed raises a strong presumption that the entry was with the intent to commit such a felony;⁷ but this presumption may be overcome by proof if it clearly appears that the entry was not for that but for some other purpose.⁸ If no felony was committed, then the intent to commit the felony charged must be distinctly proved,⁹ and it is not sufficient to prove another felony which would have made the offense complete if it had been charged.¹⁰ Evidence of the intoxication of the defendant at the time of the entry is admissible to be con-

¹ *People v. Larned*, 3 Se'd., 445; *State v. Harrold*, 38 Mo., 496.

² *Com. v. Williams*, 2 Cush., 582.

³ *Id.*

⁴ *State v. Reed*, 20 Iowa, 420.

⁵ 2 East P. C., 551; 1 Hale P. C., 551; *Rex v. Smith*, Russ. & Ry., 417; *Rex v. Jordan*, 7 Car. & P., 432.

⁶ *Lewis Cr. L.*, 137; 3 *Chitty Cr. L.*, 1103; *State v. Bancroft*, 10 N. H., 105; 2 *Park. Cr. R.*, 583; *People v. Marks*, 4 *Park. Cr. R.*, 153; *Com. v. Doherty*, 10 Cush., 52; *State v. Boon*, 13 Ired., 244.

⁷ 1 Hale P. C., 560; *Roscoe Cr. Ev.*, 365; 3 *Greenl. Ev.*, § 82; *People v. Marks*, 4 P. C., R., 153; *Rex v. Locost*, J. Kel., 30.

⁸ 2 Arch. C. P. & Pl., 309; 1 Hale P. C., 559, 561; *Rex v. Knight*, 2 East P. C., 510.

⁹ 3 *Greenl. Ev.*, § 82; *Roscoe Cr. Ev.*, 364.

¹⁰ *Rex v. Dobbs*, 2 East P. C., 513; *Rex v. Dingly*, 2 Leach, 840, 841; 1 Hale, 561; *Rex v. Knight*, 2 East P. C., 510; *Higgins v. Lee*, 16 Ills., 501; *Rex v. Jenks*, 2 East P. C., 514.

sidered by the jury in determining whether the entry was with intent to commit a crime or not.¹ It is not necessary that the offense alleged and proved to have been intended to have been committed should be a felony at common law, for if it is made a felony by statute it is sufficient.² If, however, the prisoner enters with the intent to commit a trespass or misdemeanor, it is no burglary.³ As where the prisoner enters with the intent to beat some person in the building, even though killing or murder may be the consequence, yet if the primary intention was not to kill or commit a felony, it is no burglary.⁴ It has been held that if there were facts unknown to the defendant, making it impossible for the defendant to commit the felony intended, there is no burglary,⁵ but the correctness of this doctrine has been questioned.⁶ If the prosecutor fails to prove the forcible breaking or entry, or that it was willful or malicious, or with the intent charged, still the prisoner may be convicted of larceny if he is charged with the actual commission of such offense. It would be otherwise if only an attempt to commit such offense is charged.⁷

§ 470. **View by Jury.** — It has been held that in a suitable case the jury may have a view of the premises burned⁸ or of a board from the burned building.⁹

¹ *State v. Bell*, 29 Iowa, 316.

² 3 Greenl. Ev., § 82; *Rex v. Knight*, 2 East P. C., 510; *R. v. Gray Str.*, 481.

³ *Com. v. Newell*, 7 Mass., 245; *Rex v. Dingley*, 1 Show, 53; *Rex v. Knight*, 2 East P. C., 510; *State v. Cooper*, 16 Vt., 551; *Anonymous*, Dalison, 22; *State v. Eaton*, 3 Harring. Del., 554; *State v. Wilson*, Cox, 439, 441.

⁴ 1 Hale P. C., 561; *Rex v. Knight*, 2 East P. C., 509, 510.

⁵ *Rex v. Jenks*, 2 Leach, 774, 2 East P. C., 514; *Rex v. Lyons*, 2 East P. C., 497.

⁶ 2 Bish. Cr. L., § 114.

⁷ *Reg. v. Clark*, 1 Car. & K., 421; *Anonymous*, 31 Me., 592; *Com. v. Hope*, 22 Pick., 1; *People v. Snyder*, 2 Park. Cr. R., 23; *State v. Brady*, 14 Vt., 353; *State v. Cocker*, 3 Harring. Del., 554; *Rex v. Withal*, 2 East P. C., 515, 517, 1 Leach, 88.

⁸ *Fleming v. State*, 11 Ind., 234.

⁹ *Com. v. Betton*, 5 Cush., 427.

3. EMBEZZLEMENT.

§ 471. **When Larceny.** — “Whoever embezzles or fraudulently converts to his own use or secretes, with intent to embezzle or fraudulently to convert to his own use, money, goods or property delivered to him, which may be the subject of larceny, or any part thereof, shall be deemed guilty of larceny.”¹

§ 472. **By Officers of Corporations, etc.** — “If any officer, agent, clerk or servant of any incorporated company; or if a clerk, agent, servant or apprentice of any person or co-partnership, or society, embezzles or fraudulently converts to his own use, or takes and secretes with intent so to do, without the consent of his company, employer or master, any property of such company, employer, master, or another, which has come to his possession, or is under his care by virtue of such office or employment, he shall be deemed guilty of larceny.”²

§ 473. **By Banker, Officer or Agent.** — “If any banker or broker, or his agent or servant, or any officer, agent or servant of any banking company or incorporated bank, fraudulently converts to his own use, or fraudulently takes and secretes with intent so to do, any bullion, money, note, bill, bond or other property belonging to and in the possession of such bank, banker, broker or banking company, or belonging to any person, and deposited therein or therewith, he shall, whether intrusted with the custody thereof or not, be deemed guilty of larceny.”³

§ 474. **Of Railroad Ticket.** — “Whenever any person in the employ of any railroad company, whether such company is incorporated by this or any other state, shall fraudulently

¹ R. S., 362, § 74; see *Zschocke v. People*, 62 Ills., 127; *White v. State*, 20 Wis., 246; *Ennis v. State*, 3 Greene Iowa, 67; *State v. Stoller*, 38 Iowa, 321.

² R. S., 362, § 75; *State v. Orwig*, 24 Iowa, 103. The U. S. St. of 1864, c. 106, § 55, making embezzlement of the funds of a national bank by one of its officers a misdemeanor, does not interfere with the jurisdiction of the state courts over larcenies committed upon the property of a national bank by one of its officers. *Com. v. Barrey*, 116 Mass., 1.

³ R. S., 362, § 76.

neglect to cancel or return to the proper officer, company, or agent any coupon or other railroad ticket or pass, with the intent to permit the same to be used in fraud or injury of any such company, or if any person shall steal or embezzle any such coupon or other railroad ticket or pass, or shall fraudulently stamp or print or sign any such ticket, coupon or pass, or shall fraudulently sell or put in circulation any such ticket, coupon or pass, the person so offending shall be punished by imprisonment in the penitentiary for the term of one year.”¹

§ 475. **By Commission Merchants and Others.** — “If any warehouseman, storage, forwarding or commission merchant, or other person selling on commission, or his agent, clerk or servant, shall convert to his own use any fruit, grain, flour, beef, pork, or other property, or the proceeds or avails thereof, without the consent of the owner thereof, or shall fail to pay over the avails or proceeds thereof, less his proper charges, on demand by the person entitled to receive the same, or his duly authorized agent, he shall be fined not exceeding one thousand dollars, or confined in the county jail not exceeding one year, or both, and shall be liable to the person injured in double the value of the property or amount of the money so converted.”²

§ 476. **By Attorneys and Other Officers.** — “If any attorney-at-law, justice of the peace, constable, clerk of a court, or other person authorized by law to collect money, shall fail or refuse to pay over any money collected by him, less his proper charges, on demand by the person entitled to receive the same, or his agent duly authorized, he shall be fined not exceeding double the amount retained by him, or confined in the county jail not exceeding one year, or both, and be removed from his office, and thereafter he shall be ineligible to be elected or appointed to or hold any office under the constitution or laws of this state. And if such offender is an at-

¹ R. S., 363, § 77.

² Id., § 78. An actual demand must be proved in order to secure a conviction under this section. *Wright v. People*, 61 Ill., 382.

torney-at-law, he shall thereafter be forever prohibited from practicing his profession in this state.”¹

§ 477. **By a Public Officer or his Servant.** — “If any state, county, township, city, town, village or other officer elected or appointed under the constitution or laws of this state, or any clerk, agent, servant or employe of any such officer, embezzles or fraudulently converts to his own use, or fraudulently takes or secretes with intent so to do, any money, bonds, mortgages, coupons, bank bills, notes, warrants, orders, funds or securities, books of record, or of accounts, or other property belonging to or in the possession of the state or such county, township, city, town, or village, or in the possession of such officer by virtue of his office, he shall be imprisoned in the penitentiary not less than one nor more than fifteen years.”²

§ 478. **By Public Officer in Loaning or Using Public Funds.** — “If any state, county, township, city, town, village or other officer elected or appointed under the constitution or laws of this state, master in chancery, commissioner or other officer of any court, or any clerk, agent, servant, or employe of any such officer, shall use by way of investment or loan for his own use, except as authorized by law, with or without interest, any portion of the money, bonds, mortgages, coupons, bank bills, notes, warrants, orders or other funds or securities intrusted to him for safe-keeping, disbursement, transfer or other purpose, if the sum or value of the property so used does not exceed one hundred dollars, he shall be fined not exceeding two hundred dollars, or confined in the county jail not exceeding three months, or both, or if the sum or value of the property so used or loaned exceeds one hundred dollars, he shall be fined in double the amount so used or loaned, or confined in the county jail not exceeding one year, or both.”³

§ 479. **Indictment.** — “In prosecutions for the offense of embez-

¹ R. S., 363, § 79, *People v. Palmer*, 61 Ills., 255.

² R. S., 363, § 80, *State v. Orwig*, 24 Iowa, 102.

³ R. S., 363, § 81.

zling, fraudulently converting to one's own use, or fraudulently taking or secreting with intent so to embezzle and convert the bullion, money, notes, bank notes, checks, drafts, bills of exchange, obligations or other securities for money, of any person, bank, incorporated company or copartnership, by a cashier or other officer, clerk, agent or servant of such person, bank, incorporated company, or copartnership, it shall be sufficient to allege generally in the indictment an embezzlement, fraudulent conversion, or taking with such intent, of funds of such person, bank, incorporated company or copartnership to a certain value or amount, without specifying any particulars of such embezzlement, and on the trial evidence may be given of any such embezzlement, fraudulent conversion, or taking with such intent, and it shall be sufficient to maintain the charge in the indictment, if it is proved that any bullion, money, note, bank note, check, draft, bill of exchange, or other security for money of such person, bank, incorporated company or copartnership, of whatever value or amount, was fraudulently embezzled, converted or taken with such intent, by such cashier or other officer, clerk, agent or servant.¹

STATEMENT OF THE OFFENSE OF EMBEZZLEMENT.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, fraudulently and feloniously² did without then and there having the consent of the said A. B., embezzle a large sum of money,³ to wit., the sum of one hundred dollars, the goods and chattels of the said A. B., then and there delivered to the said C. D., by the said A. B.,⁴ which said money

¹ R. S., 364, § 82.

² It was held to be sufficient to charge in conclusion that the prisoner "feloniously did steal," etc., omitting the word "feloniously" before the words "did embezzle." *Rex v. Crighton*, Russ. & Ry., 62.

³ It has been held that it was necessary to state what money was embezzled, giving a description of the number, denomination of the coin or notes as in larceny. *Rex v. Flower*, 5 B. & C., 736, 8 D. & Ry., 512; *Rex v. McGregor*, 3 B. & P., 106, 109; 2 East P. C., 576; *Rex v. Furmeaux*, Russ. & Ry., 335; *State v. Stinson*, 4 Zab., 9; but under our statute this is not necessary. R. S., 364, § 82; *Rex v. Johnson*, 3 M. & Sy., 539.

⁴ It is not necessary to state by whom the money was delivered. *Rex v. Beacall*, 1 Car. & P., 310; *Rex v. Wellings*, 1 Car. & P., 454; *contra*, *People v. Bailey*, 23 Cal., 577.

was then and there the subject of larceny, and so the said A. B., on his oath says, that the said C. D., then and there in the manner and form aforesaid, the said money, the property of the said A. B., from the said A. B. feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF EMBEZZLEMENT BY AN OFFICER OF A CORPORATION.²

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, then and there being an officer, *to wit.*, a cashier of an incorporated company called (*insert the name of the corporation*), fraudulently and feloniously did embezzle without then and there having the consent³ of the said company, a certain sum of money, *to wit.*, five ten-dollar legal tender notes of the United States, for the payment of ten dollars, each of the value of fifty dollars, the property of the said company, which said money, then and there came to the possession of the said C. D. by virtue of the said office; and so the said A. B. on his oath says, that the said C. D., then and there in manner and form aforesaid, the said money, the property of the said company, from the said company feloniously did steal, take and carry away,⁴ contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF FRAUDULENTLY NEGLECTING TO CANCEL RAILROAD TICKET.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, then and there being in the employ of a certain railroad company, duly incorporated under the laws of this state of Illinois, called (*insert the*

¹ It has been held that an indictment must set out the facts of embezzlement and then aver so the defendant committed the larceny. *Com. v. Simpson*, 9 Met., 138; *Rex v. Johnson*, 3 M. & S., 539; *Rex v. Crighton*, Russ. & Ry., 62; *contra*, *Leftwich v. Com.*, 20 Grat., 716.

² There is a dicta of the court for saying that in case of embezzlement it is sufficient to charge the defendant with the stealing in the usual form. *Baxter v. People*, 3 Gilm., 383; *Leftwich v. Com.*, 20 Grat., 716; *contra*, *Com. v. Simpson*, 9 Met., 137; *Rex v. John*, 3 M. & S., 539; *Rex v. Crighton*, Russ. & Ry., 62; *Fulton v. State*, 8 Engl., 168; and see *People v. Allen*, 5 Denio, 76; *Reg. v. Moah*, 36 Eng. L., & Eq., 592.

³ It has been held necessary to allege in an indictment that the embezzlement or conversion was without the consent of his company, employer or master. *State v. Foster*, 11 Iowa, 29; but an indictment which avers the property embezzled to be the property of A. B., sufficiently negatives the consent of the owner by averring that it was without the consent of the said A. B.; *Com. v. Smith*, 116 Mass., 40.

⁴ A count for larceny and embezzlement may be joined. 2 Bish. Cr. L., 327.

name of the company) fraudulently and feloniously did neglect to cancel a certain railroad ticket of the said company, with intent then and there to permit the same to be used in fraud of the said company, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF FAILING TO PAY OVER PROCEEDS OF A SALE BY A COMMISSION MERCHANT.¹

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, then and there being a commission merchant and selling grain on commission, sold for the said A. B. on commission a large quantity of grain, *to wit.*, one hundred bushels of wheat, the property of the said A. B. for the sum of one hundred and twenty-five dollars, which said sum the said C. D. then and there received as the proceeds of the said sale; and the said C. D. afterwards, *to wit.*, on the — day of —, A. D., 18—, and while he was such commission merchant as aforesaid, at the said town of — in said county, did unlawfully fail to pay over the said proceeds of the said sale less his proper charges, *to wit.*, the sum of five dollars, on demand made therefor at the time and place last before mentioned, by the said A. B., the said A. B. then at the time and place last before mentioned, being the person entitled to receive the said proceeds of the said sale, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF FAILING TO PAY OVER MONEY COLLECTED BY AN ATTORNEY.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, then and there being an attorney-at-law, and authorized by law to collect money, unlawfully did fail and refuse to pay over a large sum of money, *to wit.*, the sum of five hundred dollars, then and there collected by the said C. D. as such attorney, for the said A. B., less C. D.'s proper charges, *to wit.*, the sum of fifty dollars, for making the said collection on demand, then and there made therefor by the said A. B., then and there being the person entitled to receive the said money so collected, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF EMBEZZLEMENT BY AN OFFICER.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, then and there being treasurer of the said county of —, duly elected, qualified and commissioned under the laws of this said state, fraudulently and feloniously did embezzle a large sum of money, *to wit.*, the sum of five thousand dollars, then and there belonging to the said county

¹ For a form of an indictment see *Wright v. People*, 61 Ills., 382.

of —, and then and there being in the possession of the said C. D. by virtue of his said office, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF LOANING PUBLIC FUNDS.

(*Commence as in the form on page 35*) that C. D., on, etc., at, etc., in the said county, then and there being treasurer of the said state of Illinois, duly elected and qualified under the constitution and laws of the said state, unlawfully did loan, not being then and there authorized by law so to do, a portion of the money, *to wit.*, the sum of five thousand dollars, then and there entrusted to him for safe keeping by virtue of his said office, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 480. **Evidence.**—The law does not presume that because money has been entrusted to an individual, he has embezzled it or appropriated it to his own use.¹ Under a statute somewhat similar to ours, it was held that where a cashier of a bank, mistaking the sum due a depositor drawing his deposit, paid him a hundred dollars too much, and the depositor receiving the money fraudulently converted to his own use this over pay, he did not thereby commit the offense defined in the statute, because the court deemed the statute applicable only where there was some sort of trust or confidence reposed in the person alleged to have committed the offense, which had been abused by him.² It has been held that the charge of embezzlement is not sustained by proof that the accused asked a little girl to lend him a small sum of money, that she thereupon handed him a large amount to count in her presence, and that he refused to return her any and fled with the whole, because the conversion of the money to his own use was not on those facts embezzlement, but was larceny;³ it would have been held otherwise if the indictment had alleged facts sufficient to constitute a larceny at common law.⁴ Evi-

¹ Thomas v. Dunaway, 30 Ills., 373.

² Com. v. Hays, 14 Gray, 62.

³ Com. v. O'Mallery, 97 Mass., 587; Gutchens v. People, 21 Ills., 642; Nichols v. People, 17 N. Y., 114.

⁴ Beckwith v. People, 26 Ills., 500; Prindeville v. People, 42 Ills., 217; Yoe v. People, 49 Ills., 414.

dence of other acts of the same character previously committed may be introduced against the defendant to show his intent.¹ Where the defendant, under any agreement between him and the prosecutor, received from the latter a watch which he was to trade for a wagon, and was to receive five dollars as a compensation for his services, it was held that this constituted such an employment as rendered the defendant guilty of embezzlement for converting the watch to his own use.²

4. GRAVES, GRAVEYARDS AND CEMETERIES.

§ 481. Provisions of the Statute as to Robbing Graves. — “Whoever willfully, and without authority, digs up, disinters, removes or conveys away from the place of sepulture or interment thereof, any human body or the remains thereof, or knowingly aids in such disinterment, removal or carrying away, and whoever is accessory thereto, either before or after the fact, shall be fined not less than one hundred, nor more than one thousand dollars, or be confined in the county jail not exceeding one year or both.”³

STATEMENT OF THE OFFENSE OF ROBBING A GRAVE.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, willfully and without authority, did dig up, remove and carry away from the place of sepulture thereof, there situate, the human body of E. F.,⁴ deceased, contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

§ 482. Provisions of the Statute as to Injuring Monuments, etc.— “Whoever willfully and maliciously injures, defaces, removes or destroys any vault, tomb, monument, gravestone, or other memorial of the dead, or any fence or inclosure about the

¹ Com. v. Tuckerman, 10 Gray, 173, 197.

² State v. Foster, 37 Iowa, 403.

³ R. S., 373, § 138.

⁴ The allegation that “the defendant willfully and without authority did remove from its grave a certain deceased child of N. H. Burke, that had yet no name given it,” etc., is sufficient. Tate v. State, 6 Blackf., 110.

same, or about any cemetery or place of burial of the dead, or willfully cuts, breaks, removes or injures any tree, shrub or plant within any such inclosure, or about or upon any grave or tomb, or wantonly or maliciously disturbs the contents of any vault, tomb or grave, shall be fined not exceeding five hundred dollars, or confined in the county jail not exceeding one year, or both.”¹

STATEMENT OF THE OFFENSE OF INJURING A GRAVE-STONE.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, wilfully and maliciously did injure and deface a certain grave-stone, then and there erected as a memorial of E. F., deceased, upon his grave, contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

5. LARCENY.

§ 483. **Defined.** — “Larceny is the felonious stealing, taking and carrying, leading, riding or driving away the personal goods of another. Larceny shall embrace every theft which deprives another of his money or other personal property, or those means or muniments by which the right and title to property, real or personal, may be ascertained. Private stealing from the person of another and from a house in the day-time, shall be deemed larceny. Larceny may be committed by feloniously taking and carrying away any bond, bill, note, receipt or any instrument of writing of value to the owner.”²

§ 484. **Punishment.** — “Every person convicted of larceny if the property stolen exceeds fifteen dollars, shall be imprisoned in the penitentiary not less than one nor more than ten years; if the value of the property stolen is less than fifteen dollars, he shall be confined in the county jail not exceeding one year, and fined not exceeding one hundred dollars.”³

§ 485. **Second Offense.** — “In case of a second conviction of the offense of petty larceny by any person over the age of

¹ R. S., 373, § 139.

² R. S., 377, § 167; *Schantz v. State*, 17 W., 251.

³ R. S., 377, § 168.

eighteen years, the punishment shall be imprisonment in the penitentiary for a term not exceeding three years, and on the trial on an indictment for petty larceny, a duly certified copy of the record of a former conviction and judgment of any court of record in this state, for a like offense against the party indicted, shall be *prima facie* evidence of such former conviction, and may be used in evidence against such party: *Provided*, that such former conviction and judgment shall be set forth in apt words in the indictment."¹

§ 486. By Bailee. — "If any bailee of any bank bill, note, money or other property, shall convert the same to his own use with intent to steal the same, or secretes the same with intent so to do, he shall be deemed guilty of larceny."²

§ 487. Of Beasts and Birds of a Wild Nature. — "Whoever without the consent of the owner, and with a felonious intent, takes any beast or bird, ordinarily kept in a state of confinement, and not the subject of larceny at common law, shall be deemed guilty of larceny."³

§ 488. Horse Stealing. — "Whoever feloniously takes or steals any horse, mule or ass, shall be imprisoned in the penitentiary not less than three nor more than twenty years. The words "horse," "mule," "ass," shall include animals of both sexes and all ages."⁴

§ 489. Of Lead Pipe, etc. — "Every person who shall feloniously steal, take and carry away any lead pipe, faucet, or faucet and stop-cock, from any dwelling-house or other building, whether the same be attached to such house or building or not, or whether the same be laid in the ground separate from such house or building, shall be deemed guilty of larceny, and punished accordingly."⁵

§ 490. Newspapers, etc. — "Whoever shall unlawfully and

¹ R. S., 377, § 169; *State v. Riley*, 28 Iowa, 547.

² R. S., § 170; *Zschocke v. People*, 62 Ills., 127; *State v. Schingen*, 20 Wis., 74; *State v. McDougal*, 20 Wis., 507; *Id.*, 234.

³ R. S., 377, § 171.

⁴ *Id.*, 378, § 172.

⁵ *Id.*, § 173.

feloniously steal, take and carry away any newspaper or periodical from the place where the same may be left for any other person, shall be deemed guilty of larceny, and punished accordingly. It shall be sufficient to allege, in the indictment under this section property to be in the publisher, or in the person for whom the newspaper or periodical was left.”¹

§ 491. **Of Things Attached to the Realty.** — “Whoever by a trespass, with intent to steal, takes and carries away anything which is parcel of the realty, or annexed thereto, the property of another of some value, against his will, shall be guilty of such larceny as he would be guilty of if such property were personal property.”²

§ 492. **Larceny and Falsifying Public Records.** — “If any judge, justice of the peace, sheriff, coroner, clerk, recorder, or other public officer, or any person whatsoever, shall steal, embezzle, alter, corrupt, withdraw, falsify or avoid any record, process, charter, gift, grant, conveyance, bond or contract, or shall knowingly and willfully take off, discharge or conceal any issue, forfeited recognizance, or other forfeiture, or shall forge, deface or falsify any document or instrument recorded, or any registry, acknowledgment or certificate, or shall alter, or deface, or falsify any minute, document, book, or any proceeding whatever of or belonging to any public office within this state, the person so offending shall be imprisoned in the penitentiary not less than one nor more than seven years.”³

¹ R. S., 378, § 174.

² Id., § 175.

³ Id., § 176.

STATEMENT OF THE OFFENSE OF LARCENY OF SHOES.

(Commence as in form on page 35) that C. D., on, etc., at, etc.,¹ in the said county, feloniously² did steal,³ take⁴ and carry away⁵ three⁶ pairs⁷ of shoes⁸

¹ The offense may be charged to have been committed in any county in which the thief takes or carries the goods. *Rex v. Thompson*, 2 Russ. on C., 116; *Stinson v. People*, 43 Ills., 397; *State v. Douglass*, 17 Me., 193; *Com. v. Simpson*, 9 Met., 138; *People v. Smith*, 4 Park. Cr. R., 255; *Haskins v. People*, 16 N. Y., 344; *State v. Bennett*, 14 Iowa, 479.

² The word "feloniously" is indispensable. 2 Arch. C. P. & Pl., 347; *Baker v. Com.*, 2 Va. Cas., 122; *Moora v. Watts*, Breece, 18, 2d Ed., 42. In Iowa it was held that an information for petit larceny before a justice of the peace need not charge that the larceny was feloniously committed. *State v. Sepult*, 17 Iowa, 575; *State v. Chambers*, 2 Greene Iowa, 308; see also *State v. Hogard*, 12 Minn., 293. Stealing less than fifteen dollars in value is now by statute only a misdemeanor. R. S., 377, § 168; but in such case the using of the word "feloniously" will not vitiate an indictment. *State v. Joiner*, 19 Mo., 224.

³ It has been held that the word "steal" may be omitted. *Damewood v. State*, 1 How. Missis., 262; *Engleman v. State*, 2 Ind., 91; and see *Wills v. State*, 4 Blackf., 457. So it has been held that the word "steal" has a uniform signification, and means a felonious taking and carrying away of personal property. *State v. Chambers*, 2 Greene Iowa, 309.

⁴ The word "take" is necessary; the words "lead," "drive," or "ride" away are not sufficient. 1 Hale P. C., 504, 508; 2 Id., 184.

⁵ The words "carry away," or "lead," "ride" or "drive" away are necessary. 3 Chitty Cr. L., 949; *Greene v. Com.*, 111 Mass., 418; *Com. v. Walton*, 11 Allen, 238. Proof that an animal was ridden, driven or led away will sustain the allegation that it was stolen and carried away. *Baldwin v. People*, 1 Scam., 394.

⁶ The number of the articles alleged to have been stolen must be stated. *Barb. Cr. L.*, 178; 2 Hale P. C., 182.

⁷ The allegation of stealing "one pair of boots" is not sustained by proof that the defendant stole two boots, unmatched, being the right boot of two pair. *State v. Harris*, 3 Harring., 559.

⁸ The property stolen should be stated, both in its quantity or number, quality, description and value with certainty to a common intent. 3 Chitty Cr. L., 946. The following descriptions in indictments have been held bad for uncertainty, "twenty sheep and ewes," because the number of each sort was not stated, 2 Hale P. C., 182; *State v. Long*, 11 Humph., 393: "one hundred pounds of meat," because the kind was not stated, *State v. Morey*, 2 Wis., 494; "divers sheep and doves," because the number of each was not stated, 2 Hale P. C., 183; *Stewart v. Com.*, 4 Serg. & R., 194; "three eggs," because it was not stated what sort of eggs they were, *Rex v. Cox*, 1 Car. & K., 494; "goods and chattels," because a more particular description was not given,

of the value of five dollars¹ of the goods and chattels of the said A. B.² (*conclude as in form on page 35*).

as "one horse," "one cow," etc., 3 Chitty Cr. L., 947; "£10 in money" because some of the pieces of which the money consisted was not specified, *State v. Longbottoms*, 11 Humph., 39; "sundry pieces of silver coin, made current by law, usage and custom, amounting to the sum of \$530.15," because the number and denomination of the coin was not stated² *State v. Murphy*, 6 Ala., 845; "\$3,000, lawful money of the United States," *People v. Ball*, 14 Cal., 101; "the sum of ninety dollars in United States currency of the value," etc., *Leftwich v. Com.*, 20 Grat., 716; and the words "ten dollars good and lawful money of the state of Tennessee," because the money was not described as so many pieces of gold or silver coin, and the coin called by its appropriate name, though if it had been alleged that the number and denomination were unknown the description would have been sufficient, *Com. v. Sawtelle*, 11 Cush., 142; *Com. v. Duffy*, 11 Cush., 145; *State v. Bond*, 8 Iowa, 540; but the descriptions "one hide of the value," etc., *State v. Dowell*, 3 Gill & J., 310; "thirty yards of cloth," "one coat," "one piece of cassimere," *Com. v. Campbell*, 105 Mass., 436; "a parcel of oats," *State v. Brown*, 1 Dev., 137; "six handkerchiefs," though all were in one piece, *Rex v. Nibbs*, 1 Moody 25; "nine printed books," *Rex v. Johnson*, 3 M. & S., 540; "one book" of the value of three dollars, *State v. Logan*, 1 Mo., 532; "divers, *to wit.*, nine bank notes for the payment of divers sums of money, amounting in the whole to a certain sum of money, *to wit.*, the sum of nine pounds, of the value of nine pounds," without stating the value of any note, 3 Leech, Cr. L., 1303; *Rex v. Johnson*, 3 M. & S., 540; *People v. Jackson*, 8 Barb., 687; "three promissory notes called bank notes on the bank of the United States," *McLaughlin v. Com.*, 4 Rawle, 464; *State v. Bond*, 8 Iowa, 540; *People v. Holbrook*, 13 John., 90; "one United States note commonly called a greenback, of the value of ten dollars; two United States notes commonly called greenbacks, of the value of one dollar each," *McEntree v. State*, 24 Wis., 43; "twenty-four dollars of Clark's Exchange bank bills of the value of twenty-four dollars, and seven dollars of other banks, the names of the banks to the jurors unknown, of the value of seven dollars, and one hundred and nine dollars of gold and silver coin, of the value of one hundred and nine dollars," *Munson v. State*, 4 Greene Iowa, 483; "\$180 in bank notes usually known and described as greenbacks," *State v. Hockenberry*, 30 Iowa, 504,—have each respectively been held sufficient.

¹ The value of the property stolen must be stated; 2 Hale P. C., 182; 3 Chitty Cr. L., 947; *Hope v. Com.*, 9 Met., 134; *Wilson v. State*, 1 Port., 118; *Com. v. Smith*, 1 Mass., 245; but see *Payne v. Barnes*, 5 Barb., 465. The precise value as stated need not be proved. 3 Chitty Cr. L., 947.

² The thing stolen must be described as the property of either the actual owner or of the person having a special property as bailee, and from whose possession it has been taken, 2 Arch. C. P. & Pl., 357; 2 East P. C.,

STATEMENT OF THE OFFENSE OF LARCENY OF DIFFERENT THINGS.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, divers goods and chattels of the said A. B., *to wit*., a certain mix-

650, 778; *Com. v. Maguire*, 108 Mass., 469; *State v. Woodley*, 25 Ga., 235; *State v. Dwyer*, 2 Hill S. C., 287; *Wallace v. People*, 63 Ills., 451; giving both his Christian and surname, *Willis v. People*, 1 Scam., 399; or it must be alleged that such names are unknown, 2 East P. C., 651, 781; *Com. v. Morse*, 14 Mass., 217; *Norton v. People*, 8 Cowen, 137; *Willis v. People*, 1 Scam., 399, and the proof must correspond with the allegation, *State v. Dwyer*, 2 Hill S. C., 287; *State v. Godet*, 7 Ired., 210; *Com. v. Manley*, 12 Pick., 173; *Com. v. Morse*, 14 Mass., 217; *Barker v. Com.*, 2 Va. Cas., 122; *State v. Furlong*, 1 App., 225. If it is alleged that the name of the owner is unknown, when it is known or is discovered on the trial, the prisoner must be acquitted; 3 Chitty Cr. L., 949; *Barb. Cr. L.*, 181; *Roscoe Cr. Ev.*, 640; but the burden of proof is upon the defendant to show that the owner's name was known, *Com. v. Glover*, 111 Mass., 395. The allegation that the goods stolen were owned by A. is not sustained by proof that they were owned by A. and B. jointly, or as partners, and that they were at the time the larceny was committed in A.'s possession. *Hogg v. State*, 3 Blackf., 326; *Com. v. Trimmer*, 1 Mass., 476; *State v. McCoy*, 14 N. H., 364; *State v. Owen*, 10 Rich., 169; 4 Harring., 569; *contra*, *State v. Cunningham*, 21 Iowa, 433; *Com. v. Maguire*, 108 Mass., 469. On the other hand, proof that the defendant stole the property of A., B. and C., respectively, in which they had no joint interest will not support the allegation of stealing the property of A., B. and C. *State v. Ryan*, 4 McCord, 16. If a man steal his own goods in possession of a bailee, or in the custody of a sheriff, under an execution, the ownership must be laid in the bailee or sheriff. 2 Arch. C. P. & Pl., 358; *Palmer v. People*, 10 Wen., 165. If stolen by a person other than the owner, the property may be laid in either the bailee or owner. *Rex v. Trollop*, J. Kel., 39; *State v. Mullins*, 30 Iowa, 203; *People v. Smith*, 1 Park. Cr. R., 329; *Langford v. State*, 8 Texas, 115; *State v. Ayer*, 3 Foster, 301; *Barnes v. People*, 18 Ills., 52; *State v. Furlong* 19 Me., 225; *U. S. v. Burroughs*, 3 McLean, 405; or in his executor or administrator if the bailee or owner is dead, *Cole v. Com.*, 5 Grat., 696; *Wonson v. Sayward*, 13 Pick., 402; but not in the estate, *State v. Woodley*, 25 Ga., 235; or it may be laid in the defendant in execution, 2 Arch. C. P. & Pl., 358; United States Treasury notes in the possession of a person may properly be alleged to be the goods and chattels of that person. *Smith v. People*, 39 Ills., 234. Where in an indictment for larceny it was charged that the property alleged to have been stolen was the property of the "American Merchant's Union Express Company," in the absence of an averment that such company was a corporation, it was held that the ownership of the property was defectively stated and that the overruling of the defendant's motion to quash the indictment on that ground was fatal to the judgment. *Wallace v. People*, 63 Ills., 451. The mortgagors of personal property who by the stipulations of the mortgage are entitled to the posses-

ture¹ consisting of one bushel of oats of the value of fifty cents, one bushel of beans of the value of one dollar, and one bushel of chaff of the value of ten cents, one turkey² of the value of one dollar,³ one coat of the value of ten dollars, one vest of the value of five dollars, one sheep⁴ of the value of ten dollars, and one United States note of the denomination of ten dollars, commonly called a greenback,⁵ of the value of ten dollars, three United States legal tender treasury notes of the denomination of one hundred dollars,⁶ each of the value⁷ of one hundred dollars, feloniously did steal, take and carry away (*conclude as in the form on page 35*).

sion, have an interest therein which may be the subject of a larceny. *State v. Quick*, 10 Iowa, 451. Where the punishment of common law offenses is fixed by statute, in such cases the indictment need not conclude "against the statute." 2 Bish. Cr. P., §717, *ante* page 37, note. But when the statute makes an offense larceny which was not larceny at common law, the indictment should conclude "against the form of the statute." *Warner v. Com.*, 1 Barr, 154; *Rex v. Pearson*, 5 Car. & P., 121; *People v. Cook*, 2 Park. Cr. R., 12; see *State v. Ripley*, Brev., 300.

¹ Where articles of different kinds are mixed together, as oats, beans, chaff, etc.; they must be described as mixed; in such case, the allegation "one bushel oats, one bushel beans, and one bushel of chaff," would be bad. *Rex v. Kettle*, 3 Chitty Cr. L., 947a.

² If the animal was dead it must be so stated, otherwise it will be presumed to have been alive, and if it turns out on the trial to have been dead the variance will be fatal. 2 Arch. C. P. & Pl., 348; *R. v. Holloway*, 1 Car. & P., 128.

³ It is sufficient if the total value of all the property taken is alleged. *Clifton v. State*, 5 Blackf., 224; *State v. Murphy*, 8 Blackf., 498; *Warren v. State*, 1 Greene Iowa, 106; *Ray v. State*, 1 Greene Iowa, 316; *State v. Hart*, 29 Iowa, 268; *State v. Buck*, 46 Me., 531; *State v. Hood*, 51 Me., 363; although if only a collective value is stated in an indictment and the defendant is found guilty of stealing only a part, no judgment can be entered against him. *Com. v. Lavery*, 101 Mass., 207; *Hope v. Com.*, 9 Met., 134; *Rex v. Forsyth, Russ. & Ry.*, 274; *contra*, *State v. Buck*, 46 Me., 531.

⁴ The allegation, "one sheep" is sustained by proof that the animal stolen was between nine and twelve months old, some of the witnesses calling it a lamb, others a sheep, 2 Arch. C. P. & Pl., 350; *R. v. Spicer*, 1 Car. & K., 699.

⁵ Sufficient, *McEntree v. State*, 24 Wis., 43; *State v. Hockenberry*, 30 Iowa, 505.

⁶ Sufficient, *Collins v. People*, 39 Ills., 235.

⁷ Where the value of the note is not fixed by law, it is necessary to allege the value of the note. *Wilson v. State*, 1 Porter, 118; otherwise if the value is fixed by the state and the note is described as being of a certain amount. *State v. Fulford*, Phil. N. C., 563; and see *Collins v. People*, 39 Ills., 235; *Sallie v. State*, 39 Ala., 691.

§ 493. Evidence. — 1. There must be Proof of Taking, Carrying, Leading or Riding away from the Actual or Constructive Possession of the Owner.¹ — The goods must be entirely severed from the possession of the owner,² and be taken into actual possession of the thief, though if they remain in his possession for an instant it is sufficient.³ As where goods in a shop were tied by a string, the other end of which was fastened to a counter, and the thief took the goods and carried them towards the door as far as the string would permit and was then stopped, this was held not to be a severance from the owner's possession and consequently no felony.⁴ And a like decision was given where one had his keys tied to the strings of his purse in his pocket, and the thief was detected with the purse in his hand which he had taken out of the pocket but was still detained by the keys attached by the string and hanging in the pocket.⁵

§ 494. Continued — What a Sufficient Taking and Carrying away. — In proof of the carrying away it is sufficient to show that every part of the thing taken was removed from the space which that part occupied, though the whole thing was not removed from the whole space which the whole thing occupied.⁶ As if a man lift a bag from the bottom to the top of a boot of a coach,⁷ or a pocket-book an inch above the top of the pocket in the coat of another,⁸ with intent to steal it, and is detected before accomplishing his purpose, the carrying away is sufficient to make the offense larceny. So if

¹ 3 Greenl. Ev., §§ 154, 161; *Baldwin v. People*, 1 Scam., 304.

² *Reg. v. Hall*, 2 Car. & K., 947; 1 Denison C. C., 381; *State v. Wilson*, Coxe 439; *Rex v. Walsh*, 1 Moody, 14; *Reg. v. Simpson*, 29 Engl., 530.

³ *Anon.*, 2 East P. C., 556; *Reg. v. Hall*, 2 Car. & K., 947; *Rex v. Rawlins*, 2 East P. C., 617.

⁴ *R. v. Wilkinson*, 1 Hale P. C., 508; *Anon.*, 2 East P. C., 508; *Rex v. Cherry*, 1 Leach, 236; 1 Hawks P. C., 147.

⁵ *Wilkinson's Case*, 1 Hale P. C., 508; *Id.*, 533; *Lapier's Case*, 2 East P. C., 557; *Reg. v. Simpson*, 29 Eng. L. & Eq., 530.

⁶ 3 Greenl. Ev., § 154; 2 Russ. on C., 6; *Rex v. Cherry*, 1 Leach, 236; 2 East P. C., 556.

⁷ *Rex v. Walsh*, 1 Moody C. C., 14.

⁸ *Barb. Cr. L.*, 168; *R. v. Thompson*, *Moody & Ry. C. C.*, 78.

goods are taken from one room to another in the owner's house,¹ or removed from a trunk to the floor,² or from the head to the tail of a wagon,³ or if a horse be taken in one part of the owner's close and led to another, the thief being surprised before his design was accomplished, the carrying away is complete.⁴ But the merely raising up a bail of linen and setting it on end, without removing every part from the place where it lay, is not a sufficient taking and carrying away to make the offense larceny.⁵

§ 495. **Taking by an Innocent Agent.**—It is not necessary that the taking should be by the hand of the accused, for if he procured an innocent agent, as a child or a lunatic, to take the property, or if he procured a sheriff or other person to take it on a writ of replevin or other process, without color of title with a felonious design, he will himself be the principal offender.⁶ In like manner, though the possession be delivered by the owner, yet if it be obtained by fraud, it amounts to a tortious taking or trespass, as much as if the party had taken it without any delivery on the part of the owner.⁷ It has, however, been held that obtaining goods under a fraudulent purchase, the vendor delivering them with the intention of parting with the property in the goods, does not constitute larceny,⁸ though the title to the property does not pass,⁹ the

¹ 1 Hawks P. C. C., 33, § 25; *Rex v. Pitman*, 2 Car. & P., 423.

² 1 Hawks P. C. C., 33, § 28.

³ *Rex v. Coslet*, 1 Leach, 236.

⁴ 3 Greenl. Ev., § 154.

⁵ *Rex v. Cherry*, 2 East P. C., 556; *Reg. v. Wallis*, 3 Cox C. C., 67.

⁶ *Roscoe Cr. Ev.*, 587; *Barb. Cr. L.*, 157; 2 East P. C., 555; *Rex v. Williams*, 1 Car. & K., 195; *Rex v. Summers*, 3 Salk., 194; *Com. v. Low, Thatcher C.* C., 477; *Rex v. Gardiner*, J. Kel., 46.

⁷ *Barb. Cr. L.*, 157, 158; 2 East P. C., 555.

⁸ *Mowery v. Walsh*, 8 Cowen, 238; *Lever v. Com.*, 15 Serg. & R., 93; *Ross v. People*, 5 Hill, 294; *State v. Lindenthal*, 5 Rich., 237; *Welsh v. People*, 17 Ills., 339; *Stinson v. People*, 43 Ills., 397.

⁹ *Henshaw v. Bryant*, 4 Scam., 97; *Gray v. St. John*, 35 Ills., 222; *Bowen v. Schuyler*, 41 Ills., 192; *Butters v. Haughwort*, 42 Ills., 19; *Ryan v. Brant*, 42 Ills., 79; *Blow v. Gage*, 44 Ills., 209; *Dew. v. Lewis*, 51 Ills., 255; *Nichols v. Michael*, 23 N. Y., 264.

consent of the owner is a nullity,¹ and the taking is tortious.²

§ 496. **Taking by a Servant, Custodian, etc., or by one Getting the Property into his Own Hands by Artifice, Strategem, etc.** — The conversion of property with intent to steal it by one who has only the care, charge or custody of it for the owner, as his servant or agent or otherwise, is a sufficient taking to constitute the offense of larceny, for in judgment of law the possession remains in the owner until the conversion.³ As where a bill or coin is put in the hands of a party to get change and he appropriates it,⁴ or where a servant, having the goods of his master in his custody, embezzles them,⁵ or steals his master's oats, though he feeds them to his master's horses,⁶ or where a man hires another's horse to go a journey, with intent to steal it and absconds with it or sells it,⁷ or where property is inadvertently left in the possession of another and the latter, with the intention of stealing it, conceals it,⁸ such taking is larceny. So if the owner parts with the possession voluntarily, but does not part with the title, expecting and intending that the same thing will be returned to him, or that it shall be disposed of on his account or in a particular way as directed or agreed upon for his benefit, then the goods may be feloniously converted by the bailee so as to relate back and make the taking larceny.⁹ So if a person, with the felonious intent to con-

¹ *Cary v. Hotailing*, 1 Hill, 314; *Ash v. Putnam*, Id., 303.

² *Acker v. Campbell*, 22 Wen., 372; *Thurston v. Blanchard*, 22 Pick., 18, 20; *Ladd v. Moore*, 3 Sand., 591; *Stillman v. Squire*, 1 Denio, 327.

³ Barb. Cr. L., 157; *People v. Call*, 1 Denio, 120.

⁴ *Farrel v. People*, 16 Ills., 506; *Rex v. Coleman*, 2 East P. C., 672; *Rex v. Sullins*, 1 Moody, 129; *Reg. v. Thomas*, 9 Car. & P., 741.

⁵ Barb. Cr. L., 161; *Morfit's Case*, Russ. & Ry., 307; *Reg. v. Handley*, 1 C. & M., 547; *Reg. v. Privett*, 2 C. & M., 114; *Reg. v. Samways*, 26 Eng. L. & Eq., 576.

⁶ *Morfit's Case*, Russ. & Ry., 307; *R. v. Handley*, C. & M., 547; *R. v. Smith*, 1 Cox C. C., 10.

⁷ *Pear's Case*, 2 East P. C., 685; *Charlewood's Case*, 2 East P. C., 689; *Welsh v. People*, 17 Ills., 342; *Starker v. Com.*, 7 Leigh, 752.

⁸ *People v. McGarren*, 17 Wen., 460; *State v. Gorman*, 2 Nott & McC., 90.

⁹ *Welsh v. People*, 17 Ills., 339; *Stinson v. People*, 43 Ills., 397; *Rex v. Hench*, Russ. & Ry., 163; *Reg. v. Adams*, 1 Den. C. C., 38; *Rex v. Atkinson*, 2 East P. C., 673.

vert the property to his own use or to deprive the owner wholly of it, gets it into his hands by some artifice or trick, the owner not intending to part with the title, but consenting to such taking, with the understanding that it should not be carried away, and should be immediately returned, unless purchased or paid for, and then keeps it or runs away with it, such taking is larceny.¹ As if he takes goods into his hands with the consent of the owner, intending to steal them, under the pretext or pretense of looking at them with a view of buying them, and then runs away with the goods, this is larceny.² But if the owner voluntarily parts with the possession and title, neither the taking nor conversion is larceny.³

§ 497. *Taking the Goods of the Husband or Wife.*—It is not larceny for the husband to take the property of the wife,⁴ or for the wife to take the property of her husband,⁵ or property owned jointly by her husband with others.⁶ But it is larceny for a man who elopes with another's wife to take his goods, though with the consent and at the solicitation of the wife.⁷ Yet there must be a personal taking of the goods by the person eloping with the wife, or they must be shown to be in his possession;⁸ although such taking on delivery from her hands will do,⁹ and so will a joint carrying away by the two. If a wife and adulterer elope together, carrying her clothes purchased for her by her husband, the adulterer commits a larceny of

¹ 2 Arch. C. P. & Pl., 411-415; *Rex v. Gilbert*, Moody, 185; *R. v. Pratt*, Id., *R. v. Campbell*, Id., 179; *Com. v. Wilde*, 5 Gray, 83; but see *People v. Miller*, 14 John., 371; *Rex v. Harvey*, 2 East P. C., 669.

² *Rex v. Gilbert*, Moody, 185; *R. v. Sharpless*, 2 East P. C., 675; 1 Hawks P. C. C., 33, § 15.

³ *Welsh v. People*, 17 Ills., 339; *Stinson v. People*, 43 Ills., 397.

⁴ *Thomas v. Thomas*, 51 Ills., 162.

⁵ *Barb. Cr. L.*, 158; 1 Hawks P. C., 147; *Reg. v. Tollett*, C. & M., 112.

⁶ *Rex v. Willis*, 1 Moody C. C., 375.

⁷ *People v. Schuyler*, 6 Cowen, 572; *Reg. v. Thompson*, 2 Crawf. & Dix C. C., 491; *Reg. v. Tollett*, Car. & M., 112; *Reg. v. Berry*, Bell C. C., 95; 8 Cox C. C., 117.

⁸ *Reg. v. Rosenberg*, 1 Car. & K., 233; 1 Cox C. C., 21.

⁹ *Reg. v. Featherstone*, 26 Eng. L. & Eq., 570.

the clothes, for they are the husband's property.¹ With these exceptions, a person is not guilty of larceny, who receives goods belonging to the husband from the hands of the wife,² unless he had been forbidden to take them.³

§ 498. **Taking One's Own Goods.** — Under some circumstances a man may be guilty of larceny of his own goods⁴ or of goods of which he is part owner,⁵ where the intent is to charge another with their value;⁶ as if he steals them from a pawnbroker, or if they have been levied upon by a constable, if he steals them from the constable⁷ or steals them from any one to whom he has entrusted and delivered them, who would be liable over to him for their value in case of their loss by theft.⁸ On an indictment of the owner of goods for a larceny of them from an attaching officer, evidence is admissible that the defendant intended to leave and did leave with the officer goods enough to satisfy the claim of the attaching creditor.⁹

§ 499. **Taking for Gain not Essential.** — The better opinion seems to be that it is not an essential ingredient in the offense of larceny, that the taking should be for the sake of gain,¹⁰ but upon this point the authorities are not harmonious. A fraudulent taking, with intent wholly to deprive the owner of

¹ *Reg. v. Tollett*, C. & M., 112; *contra*, *Reg. v. Fitch*, Dears & B., 187.

² *Rex v. Harrison*, 1 Leach, 47; 2 East P. C., 559; *Reg. v. Fitch*, Dears & B., 187.

³ 2 Bish. Cr. L., § 873.

⁴ 2 East P. C., 654; 1 Hale P. C., 513; *People v. Thompson*, 34 Cal., 671.

⁵ *Kiksey v. Fike*, 29 Ala., 206; *Reg. v. Webster*, Leigh & C., 77; *Reg. v. Burgess*, Leigh & C., 299.

⁶ *People v. Thompson*, 34 Cal., 671; *Palmer v. People*, 10 Wen., 165.

⁷ *Palmer v. People*, 10 Wen., 165; *State v. Dewit*, 32 Mo., 571; but see *State v. Sotherlin*, Harper, 414; *State v. Mazyck*, 3 Rich., 291; *Brownell v. Manchester*, 1 Pick., 232.

⁸ 2 Bish. Cr. L., § 793.

⁹ *Com. v. Greene*, 111 Mass., 392.

¹⁰ *Reg. v. Jones*, 1 Den. C. C., 188; 2 Car. & K., 236; *Reg. v. Privett*, 2 Car. & K., 114; *Reg. v. Handley*, C. & M., 547; *Hamilton v. State*, 35 Missis., 214; *Keely v. State*, 14 Ind., 36; *Dignowitty*, 17 Texas, 521; *State v. Brown*, 3 Strob., 508; *People v. Jaurez*, 28 Cal., 380; *contra*, 3 Greenl. Ev., § 157; *Reg. v. Godfrey*, 8 Car. & P., 563; *U. S. v. Durkee*, 1 McAl., 196; *McDaniel v. State*, 8 Sm. & M., 401, 418.

his property, or with intent to destroy it, is sufficient if the object be to effect some supposed advantage either to the party committing the offense or to a third person.¹

§ 500. **Larceny of Lost Goods.** — Formerly if one lost goods and another found them and converted them to his own use, not knowing the owner, nor at the time of finding the goods having the means of knowing who the owner was, this was no larceny, even though he denied finding them or secreted them.² But now if the finder is a bailee which he probably is,³ the statute makes him guilty of larceny if he converts the property to his own use with intent to steal the same or secretes it with the same intent.⁴ And at common law where the owner was known or there were marks or other means of instantly knowing who the owner was, and the finder secreted or appropriated the property to his own use, with intent to steal the same, he was guilty of larceny.⁵

§ 501. **Proof of Property in the Alleged Owner.** — In proof that the goods were the property of the person named as owner, and were taken from his possession, it is necessary to show that he had such an interest or special property in the goods and such a possession, actual or constructive, as would enable him to sustain an action of trespass for taking and carrying them away, for every larceny includes a trespass which involves the violating of another's possession,⁶ except in the cases provided for by statute, where the bailee steals goods in his own possession.⁷ Proof that the alleged owner had act-

¹ *Rex v. Cabbage, Russ. & Ry.*, 292; *Rex v. Morfit, Russ. & Ry. C. C.* 307; *Reg. v. Richards*, 1 Car. & K., 532; *State v. Hawkins*, 8 Port. 461; *Reg. v. Wynn*, 1 Den. C. C., 365; 2 Car. & K., 859.

² *Tyler v. People*, Breese, 227, 2d Ed., 293; *Lane v. People*, 5 Gilm., 305; *People v. Cogdell*, 1 Hill, 94; *People v. Anderson*, 14 John., 294; *State v. Taylor*, 25 Iowa, 273; *Com. v. Titus*, 116 Mass., 42.

³ 1 Par. on C., 579.

⁴ R. S., 377, § 170; and see, as to domestic animals, *State v. Martin*, 28 Mo., 530; *People v. Kaatz*, 3 Park. Cr. R., 129; *State v. Pratt*, 20 Iowa, 267.

⁵ *Lane v. People*, 5 Gilm., 305; *State v. Weston*, 9 Conn., 527; *People v. McGarren*, 15 Wen., 462; *Reg. v. Dixon*, 36 Eng. L. & Eq., 597; *State v. Williams*, 19 Mo., 389.

⁶ 2 Bish. Cr. L., § 799.

⁷ R. S., 377, § 170; *State v. Brown*, 25 Iowa, 561.

ual possession with or without title, and want of consent of both the person in possession and the actual owner if known, and entitled to the immediate possession¹ unless the defendant shows a right to the immediate possession,² or that the alleged owner had a general or qualified property in the goods stolen, and either the actual possession or the right to the immediate possession, is sufficient.³ But if a man part with the right to the immediate possession, so as not to be in a situation to maintain trespass, as if he let furniture with lodgings to a lodger, then if any of the furniture be stolen it cannot be laid as the property of the owner, but must be laid and proved as the property of the lodger.⁴ Where goods are in the possession of a bailee, as linen delivered to a laundress to wash,⁵ cattle sent to an agister to agist,⁶ goods given to a common carrier to carry,⁷ they may be described as the goods of the owner⁸ or of the bailee.⁹ But if the property be stolen from the owner's servant it must be laid to the property of the owner, for the servant is not a bailee and his possession is that of the master.¹⁰ Clothing worn by an infant

¹ 2 Arch. C. P. & Pl., 404, 405.

² *Searls v. Crombie*, 28 Ills., 396; *Ward v. People*, 3 Hill, 396; 6 Hill, 144; *State v. Addington*, 1 Bailey, 310, 311.

³ *Cannon v. Kenny*, 3 Scam., 10; *Barnes v. People*, 18 Ills., 52; *Ganche v. Mayer*, 18 Ills., 52; *Rex v. Remnant, Russ. & Ry.*, 136; *Rex v. Wymer*, 4 Car. & P., 391.

⁴ 2 Arch. C. P. & Pl., 358; *R. v. Belstead, Russ. & Ry.*, 411; *R. v. Brunswick, Moody & Ry.*, 27.

⁵ *Packer's Case*, 2 East P. C., 653.

⁶ *Woodard's Case*, 2 East P. C., 653.

⁷ *Rex v. Deakin*, 2 East P. C., 653; *Rex v. Trollop, J. Kel.*, 39; *People v. Smith*, 1 Park. Cr. R., 329.

⁸ *Reg. v. Vincent*, 2 Den. C. C., 464; 9 Eng. L. & Eq., 548; *Langford v. State*, 8 Texas, 115.

⁹ 2 Hale P. C., 181; *Reg. v. Bird*, 9 Car. & P., 44; *Jones v. State*, 13 Ala., 153; *Reg. v. Jones*, 2 Moody, 293; *State v. Wisdom*, 8 Port., 511; *State v. Furlong*, 19 Me., 225.

¹⁰ 2 East P. C., 652; *Rex v. Ruddick*, 8 Car. & P., 237; *Rex v. Adams, Russ. & Ry.*, 225; *Rex v. Hutchinson, Russ. & Ry.*, 412; but see *Reg. v. Ruddick*, 8 Car. & P., 237.

may be alleged to belong to the infant¹ or the father.² And goods stolen from a thief may be alleged to be the property of either the thief or the true owner.³

§ 502. *Larceny by a Bailee.*—It was formerly held that when a bailee obtained possession of goods without a felonious intent to steal them at the time of taking, and afterwards with a felonious intent converted the whole of them to his own use without breaking bulk, or abstracting any one of several articles intrusted to him, that such taking only amounted to a breach of trust, and was not larceny, for the reason that the owner, having parted with the possession of his goods, was not in a situation to maintain trespass, and therefore one essential element of larceny was wanting.⁴ Yet the breaking of bulk or the taking of one of several articles was held to determine the bailment and entitle the owner to the immediate possession so as to enable him to bring trespass and make it larceny to take part of the goods.⁵ But now by our statute if a bailee of property converts the same to his own use with intent feloniously to steal the same, or secretes the same with intent so to do, he is made guilty of larceny.⁶

§ 403. **2. The Taking must be Proved to be Against the Will of the Owner.**⁷—This non-consent being an essential ingredient in the offense of larceny must be proved by the best evidence the nature of the case admits.⁸ Therefore the owner, since he is the only person who can swear directly to the necessary

¹ *State v. Koch*, 4 Harring. Del., 570.

² *Reg. v. Hughes*, C. & M., 593, 2 East P. C., 654.

³ *Ward v. People*, 3 Hill, 395, 6 Hill, 144; *State v. Somerville*, 21 Me., 14; *Com. v. Finn*, 108 Mass., 466.

⁴ 3 Greenl. Ev., § 162; 2 East P. C., 695; 3 East P. C., 697; *Wright v. Lindsley*, 20 Ala., 428; *Anon.*, J. Kel., 81; *Rex v. Fletcher*, 4 Car. & P., 545; *Com. v. James*, 1 Pick., 375; *Rex v. Pratley*, 5 Car. & P., 533.

⁵ *Rex v. Maddox*, Russ. & Ry., 92; *Rex v. Brazier*, Russ. & Ry., 337; *Com. v. Brown*, 4 Mass., 580; *Nichols v. People*, 17 N. Y., 114; *Rex v. Howell*, 7 Car. & P., 325.

⁶ R. S., 377, § 170; *ante* § 486; *Phelps v. People*, 55 Ills., 334.

⁷ 3 Chitty Cr. L., 925; *Smith v. Shultz*, 1 Scam., 49; *Dodd v. Hamilton*, 2 Taylor, 31.

⁸ *Barb. Cr. L.*, 183; *People v. Murray*, 6 C. H. Rec., 65, 66.

negative, must if possible always be produced;¹ and if the goods were taken from the actual possession of another, that other must be sworn, so that it may appear that the immediate possession was violated, and this without the consent of the person holding it.² Where the owner cannot be produced other secondary evidence may be received, as if he dies before the trial his steward's oath may be received with circumstances usually attending larceny, from which the non-consent of the owner may be inferred.³ But using means to detect a thief by procuring others to appear to encourage his designs,⁴ or by marking money and putting it⁵ or other property⁶ where it would be likely to be taken up by a person suspected of being a thief, to try him, does not amount to such a consent on the part of the owner as to prevent the taking of such money or property from amounting to larceny.⁷

§ 504. **3. The Taking Must be Shown to have been with a Felonious Intent.**⁸—This means an intent fraudulently to appropriate the goods taken to the taker's own use,⁹ or wholly to deprive the owner of them,¹⁰ with the intent to steal them or *animo furandi*, and implies that there is no color of right, excuse or good reason for the act.¹¹ Such intent is an essen-

¹ Barb. Cr. L., 183; Rex v. Rodgers, 2 Campb., 654; Williams v. East Ind. Co. 3 East P. C., 192, 201; People v. Caniff, 2 Park. Cr. R., 587; Rex v. Yend., 6 Car. & P., 175; State v. Morey, 2 Wis., 494; People v. Plunket, 3 C. H. Rec., 138; *contra*, 2 Bish. Cr. P., § 752.

² 2 Arch. C. P. & Pl., 405, 406; People v. Murray, 6 C. H. Rec., 65, 66; State v. Osborne, 28 Iowa, 9.

³ Rex v. Hazy, 2 Car. & P., 458; Lawrence v. State, 4 Yerg., 145.

⁴ Rex v. Hedge, 2 Leach, 1033; Rex v. Whittingham, 2 Leach, 912; Rex v. Eggington, 1 Leach, 913.

⁵ Rex v. Williams, 1 Car. & K., 195; State v. Osborne, 28 Iowa, 9.

⁶ 2 Leach, 921, 922; State v. Covington, 2 Bailey, 569; Reg. v. Rathbone, 2 Moody, 242; Reg. v. Gardiner, 1 Car. & K., 628; Reg. v. Johnson, Car. & M., 218; U. S. v. Foye, 1 Curt. C. C., 364.

⁷ Barb. Cr. L., 159.

⁸ Smith v. Shultz, 1 Scam., 490; Phelps v. People, 55 Ills., 334; Blunt v. Com., 4 Leigh, 689; Witt v. State, 9 Mo., 663; Rex v. Holloway, 5 Car. & P., 563; State v. Gresser, 19 Mo., 247; State v. McKean, 36 Iowa, 344.

⁹ 3 Chitty Cr. L., 926; 2 Arch. C. P. & Pl., 389.

¹⁰ 2 Arch. C. P., & Pl., 389.

¹¹ 3 Greenl. Ev., § 150.

tial ingredient in larceny, even in the case of a bailee;¹ without it the taking is a mere trespass or a conversion.² Where the owner is induced by false representations or pretences to voluntarily transfer not only the possession but also the title, the offense is obtaining goods by false pretences,³ or if the prisoner's sole object was to destroy the property from motives of revenge and injury to the owner, and without the expectation of benefit or gain to himself, or the intent to steal it according to some of the authorities, the offense is malicious mischief.⁴ It is clear that there is no felonious intent if the goods are taken by mere accident, or in joke, or in mistaking another's property for one's own,⁵ or under a *bona fide* claim of right,⁶ and therefore such claim is not larceny. The taking of the goods openly but not forcibly before the owner, or in the presence of other persons;⁷ the taking tools⁸ or other property⁹ to use, or a horse to ride,¹⁰ and afterwards returning them to the same place¹¹ or abandoning the property,¹² or leaving it where it will be likely to get back to the owner¹³ or

¹ Phelps v. People, 55 Ills., 334.

² 2 Arch. C. P. & Pl., 389; Phelps v. People, 55 Ills., 334.

³ Roscoe Cr. Ev., 606; and see Welsh v. People, 17 Ills., 339; Stinson v. People, 43 Ills., 397.

⁴ 3 Greenl. Ev., § 157; Reg. v. Godfrey, 8 Car. & P., 563; but see *ante* § 11.

⁵ 2 Hale P. C., 507, 509; Com. v. Weld, Thatcher C. C., 157.

⁶ Roscoe Cr. Ev., 591; Herber v. State, 7 Texas, 69; Merry v. Green, 7 Mees. & W., 623; Rex v. Hall, 3 Car. & P., 409; Reg. v. Reed, C. & M., 306; Com. v. Doane, 1 Cush., 5; State v. Conway, 18 Mo., 321; Com. v. Stebbins, 8 Gray, 492; Daniel v. State, 8 Sm. & M., 401; State v. Holmes, 17 Mo., 379; but see State v. Bond, 8 Iowa, 540; Rex v. Knight, 2 East P. C., 510.

⁷ 1 Hale P. C., 509; State v. Holmes, 17 Mo., 379.

⁸ 1 Hale P. C., 509; 1 Hawks P. C. C., 34, § 2.

⁹ Roscoe Cr. Ev., 590.

¹⁰ 2 Arch. C. P. & Pl., 392; Crump's Case, 1 Car. & P., 658; State v. Bonnell, 2 Harring. Del., 529; State v. Hawkins, 8 Port., 461; State v. York, 5 Harring. Del., 493.

¹¹ Rex v. Wright, Car. Cr. L., 279; Reg. v. Phetheon, 9 Car. & P., 552; State v. Self, 1 Bay, 242.

¹² Phillips' Case, 2 East P. C., 662; Rex v. Dickenson, 420; Rex v. McMakin, Russ. & Ry., 333.

¹³ 3 Greenl. Ev., 157; Reg. v. Holloway, 1 Den. C. C., 370, 2 Car. & K., 942

promptly informing the owner of the taking;¹ the tendering more than the value of the goods,² and the avowing the fact of having the possession of the goods before being questioned concerning them,³ are circumstances from which it may be inferred that the taking was without a felonious intent, and therefore but a mere trespass. If, however, goods are taken with a felonious intent, it does not purge the offense by handing them immediately back to the owner.⁴ Where a carrier broke open a parcel entrusted to him and took letters therefrom, which he opened from motives of personal curiosity or to prevent them from arriving in due season at their destination, this, however illegal, was deemed no felony.⁵ Since the statute makes the felonious taking by a bailee larceny,⁶ it is not necessary now, as it was formerly,⁷ that the felonious intent should exist at the time of the taking. If it is shown to exist at any time it is sufficient.³

§ 505. 4. *Time and Place.* — Proof of the time of the commission of the offense as laid is immaterial,⁹ provided that it appears that it was committed before the indictment found or complaint made, and within three years so that the offense is not barred by the statute of limitations.¹⁰ The place must be so far proved as to show that the larceny was committed in the county in which the examination is had or indictment found.¹¹ The offense is complete in every county into which the

¹ 3 Greenl. Ev., § 157.

² *Burroughs v. Wright*, 1 East R., 615, 616; 2 East P. C., 662.

³ 1 Hale P. C., 509; 2 East P. C., 661; *State v. Holmes*, 17 Mo., 379.

⁴ *Roscoe Cr. Ev.*, 588; *State v. Scott*, 64 N. C., 586; *Rex v. Wright*, 9 Car. & P., 554; *Reg. v. Phetheon*, 9 Car. & P., 552; *Reg. v. Peters*, 1 Car. & K., 245; *Rex v. Peat*, 1 Leach, 228, 2 East P. C., 557.

⁵ *Reg. v. Godfrey*, 8 Car. & P., 563.

⁶ R. S., 377, § 170.

⁷ 3 Greenl. Ev., § 159; *People v. McGarren*, 17 Wen., 460; *Wright v. Lindsay*, 20 Ala., 428; *Rex v. Fletcher*, 4 Car. & P., 545; *Com. v. James*, 1 Pick., 375; *White v. State*, 11 Texas, 769.

⁸ *Phelps v. People*, 55 Ills., 334.

⁹ 3 Greenl. Ev., § 152.

¹⁰ R. S., 398, § 398.

¹¹ *Rice v. People*, 38 Ills., 435; *Jackson v. People*, 40 Ills., 405; *Sattler v. People*, 59 Ills., 68.

thief carries the stolen goods; for every asportation is in law a new larceny.¹ And the lapse of time between the first taking and the carrying into another county is not material.²

§ 506. 5. **What the Subject of Larceny.** — Formerly larceny could not be committed by taking any thing annexed to the freehold, as grass, growing fruits from trees,³ etc., and was confined entirely to the taking of personal property.⁴ But now by statute the offense of larceny may be committed by stealing things attached to the realty the same as if they were personal property.⁵ And beasts and birds ordinarily kept in confinement,⁶ records, processes, charters, gifts, grants, conveyances, bonds, and contracts are declared⁷ by statute to be the subject of larceny.

§ 507. 6. **Value.** — Evidence must be given that the goods are of some value, however small, or no wrong is committed in taking them.⁸ It is not necessary that they should be valuable to a third person if valuable to the owner.⁹ On the trial of an indictment the actual value of the goods must be proved so as to determine the extent of the punishment.¹⁰ And if the verdict does not find the value, a new trial must be granted or

¹ 1 Hale P. C., 507, 508; *Com. v. DeWit*, 10 Mass., 154; *Haskins v. People*, 16 N. Y., 344; *Graves v. State*, 12 Wis., 591; *State v. Somerville*, 21 Me., 14, 19; *State v. Bennett*, 14 Iowa, 479.

² *Rex v. Parkin*, 1 Moody C. C., 45.

³ 1 Hale P. C., 510; 3 Inst., 109; *State v. Hall*, 5 Harring. Del., 492; *Jackson v. State*, 11 Ohio S., 104; *Rex v. Richards*, Russ. & Ry., 28; *Reg. v. Gooch*, 8 Car. & P., 293.

⁴ *State v. Burrows*, 11 Ired., 477, 483.

⁵ R. S., 378, §§ 173, 175.

⁶ R. S., 377, § 171.

⁷ Id., 378, § 176.

⁸ 3 Chitty Cr. L., 929; *People v. Wiley*, 2 Hill, 194; *Collins v. People*, 39 Ills., 241; *Low v. People*, 2 Park. Cr. R., 37; *Reg. v. Morris*, 9 Car. & P., 349; *Payne v. People*, 6 John., 103; but see *State v. Slack*, 1 Bailey, 330; *Houston v. State*, 8 Engl. Rep., 66.

⁹ *Rex v. Phipoe*, 2 Leach, 673; *Rex v. Clark*, Russ. & Ry., 181; 2 Leach, 1036.

¹⁰ 3 Greenl. Ev., § 152; *Hildreth v. People*, 32 Ills., 36.

the judgment arrested.¹ But a jury cannot aggregate the value of the property stolen at different times, so as to send the accused to the penitentiary.² United States treasury notes are by law declared to be legal tender, and equivalent to coined money, and are therefore, themselves sufficient evidence of value.³ Where the amount and value of bank bills are shown, it will be presumed that they were genuine.⁴ It is error to allow a jury, three days after their verdict has been received and they have been discharged, to meet together and amend their verdict by finding the value of the property stolen.⁵

§ 508. 7. **Identity.** — The identity of the prisoner with the one charged with, and the one who committed the offense should be shown,⁶ but on the trial of an indictment the name of the prisoner need not be proved unless put in issue by a plea in abatement.⁷ So the goods stolen must be proved to be the same as those charged to have been taken,⁸ but proof that the accused stole a mare or gelding will sustain the charge of stealing a horse.⁹

§ 509. 8. **Circumstances Tending to Show the Guilt of the Accused.** — The evidence in cases of larceny usually consists, unless the prisoner is detected in the act, of proof of the offense having been committed, and of the goods stolen being found shortly afterwards in the possession of the prisoner, with such facts and circumstances as tend to show the guilt of the ac-

¹ *Highland v. People*, 1 Scam., 392; *Sawyer v. People*, 3 Gilm., 53; *Collins v. People*, 39 Ills., 241; *Williams v. People*, 44 Ills., 478; *State v. Redman*, 17 Iowa, 329.

² *Monoughan v. People*, 24 Ills., 340.

³ *Collins v. People*, 39 Ills., 240; and see *Com. v. Stebbins*, 8 Gray, 492; *Shaw v. State*, 3 Sneed, 86; *Crawford v. State*, 2 Ind., 132.

⁴ *State v. Pratt*, 20 Iowa, 267.

⁵ *Williams v. People*, 44 Ills., 478.

⁶ 3 Greenl. Ev., § 152.

⁷ *Turns v. Com.*, 6 Met., 224, 235; *Com. v. Dedham*, 16 Mass., 139.

⁸ 2 Arch. C. P. & Pl., 348, 402.

⁹ *Baldwin v. People*, 1 Scam., 304.

cused.¹ The possession of stolen property soon after it was stolen is of itself *prima facie* evidence that it was stolen by the party in whose possession it was found.² And when considered in the light of the surrounding circumstances, such as selling them at under value, his pawning them, and his denying their being or having been in his possession; his secreting them; his giving false accounts of how or when he came by them; his being near the place where and about the time they were stolen, or the like,³ may be the strongest kind of evidence of the guilt of such person, while under different circumstances it may be the slightest, even if any, evidence of guilt;⁴ as if the goods were found in his store,⁵ out-house,⁶ house,⁷ or open shop,⁸ to which other persons capable of stealing then had access.⁹ The mere finding of stolen goods in the house of the prisoner where there are other inmates of the house capable of stealing the property, has been held insufficient evidence to prove possession by the prisoner.¹⁰

§ 510. **Presumption from Possession, how Rebutted.** — The presumption arising from possession alone is completely re-

¹ Barb. Cr. L., 183; State v. Arnold, 12 Iowa, 480; State v. Taylor, 25 Iowa, 274; State v. Woolsey, 30 Iowa, 252.

² Jones v. People, 12 Ills., 259; Comfort v. People, 54 Ills., 404; Crilley v. State, 20 Wis., 245; Graves v. State, 12 Wis., 591; State v. Weston, 9 Conn., 527; State v. Brewster, 7 Vt., 118, 122; State v. Bruin, 34 Mo., 537; State v. Brown, 25 Iowa, 561; *contra*, Conkwright v. People, 35 Ills., 206; People v. Gassaway, 23 Cal., 551; Heed v. State, 25 Wis., 421; Hunt v. Com., 13 Grat., 757.

³ 2 Arch. C. P. & Pl., 397; 2 East Cr. L., 657; Conkwright v. People, 35 Ills., 206; Knickerbocker v. People, 43 N. Y., 177; Penn v. Myers, Addis., 320, 321.

⁴ Conkwright v. People, 35 Ills., 206; People v. Ah Ki., 20 Cal., 177; Graves v. State, 12 Wis., 591; Heed v. State, 25 Wis., 421.

⁵ Conkwright v. People, 35 Ills., 204.

⁶ State v. Smith, 2 Ired., 402.

⁷ 4 Stark. Ev., 840, n. z.

⁸ 2 Arch. C. P. & Pl., 402.

⁹ State v. Williams 2 Jones N. C., 194; Sartorius v. State, 24 Missis., 602; Jones v. State, 30 Missis., 653; Hall v. State, 8 Ind., 439; Simpson v. State, 4 Humph., 456; but see Com. v. Maguire, 108 Mass., 469.

¹⁰ Stark. Ev., 839, 840; 2 East P. C., 657; Barb. Cr. L., 185.

moved by the good character of the prisoner if proved.¹ So this presumption may be rebutted by showing that the accused had fairly acquired the property by purchase.² So the presumption is rebutted by the lapse of time.³ The length of time required for this purpose will depend upon the circumstances of each case;⁴ the account he gives of how he came by the possession;⁵ the unsuspicious or suspicious conduct of the accused;⁶ and the nature of the article stolen, for if it be of a kind that naturally passes rapidly from hand to hand, it would be more likely to pass out of the hands of the thief, and be found in the possession of an innocent person sooner than if of a different nature.⁷ In one case, where the only evidence against the accused was that the stolen property was found in his possession three months after it had been stolen, the court directed his acquittal.⁸ In another case, goods which had been lost sixteen months before were found in the house of the prisoner, and this being the only evidence against him, the court directed his acquittal without calling on him for his defense.⁹ On the other hand, a horse being stolen on the 10th, and found on the 16th of the same month, sixty miles distant from the place of taking, in the possession of the prisoner, this was held to raise the presumption of his guilt.¹⁰ And in another case two months were held not to rebut the presumption.¹¹ The possession of the goods is always ev-

¹ *People v. Turell*, 1 Wheeler, C. C., 34; *Conkwright v. People*, 35 Ills., 204; *Walsh v. People*, 65 Ills., 58; but see *State v. Turner*, 19 Iowa, 149.

² *Jones v. People*, 12 Ills., 259; *Conkwright v. People*, 35 Ills., 204.

³ 2 Arch. C. P. & Pl., 393, 401; *State v. Floyd*, 15 Mo., 349; *State v. Wolf*, 15 Mo., 163; *Hughes v. State*, 8 Humph., 75; *Hall v. State*, 8 Ind., 439.

⁴ *State v. Jones*, 3 Dev. & Bat., 122; *State v. Shaw*, 4 Jones N. C., 440; *State v. Williams*, 9 Ired., 140; *Jones v. State*, 26 Mo., 247.

⁵ *Rex v. Watson*, 2 Stark. R., 137; *Walker v. State*, 28 Ga., 254; *State v. Adams*, 1 Hayw., 464; *State v. Brown*, 25 Iowa, 565.

⁶ Barb. Cr. L., 185; 2 Arch. C. P. & Pl., 401; *State v. Bennett*, 2 Const., 692.

⁷ 4 Stark. Ev., 841; *Reg. v. Partridge*, 7 Car. & P., 551, 2 East P. C., 656; *State v. Bruin*, 34 Mo., 537; *Rex v. Atkinson*, 1 Crawford & Dix. C. C., 161.

⁸ *Rex v. Adams*, 3 Car. & P., 600.

⁹ *Rex v. —*, 2 Car. & P., 459.

¹⁰ *State v. Adams*, 1 Hayw., 463.

¹¹ *State v. Bennett*, 2 Const. R., 692, 3 Brev., 514.

idence, be the time longer or shorter, however insufficient, it may be, *per se*, after a considerable lapse of time.¹ Proof that part of the goods stolen were found in the possession of the prisoner is presumptive evidence, that he is guilty of stealing the whole,² if there are other circumstances to establish his guilt as to those found.³ If, where stolen goods are found in the possession of a person, he gives a reasonable account of how he came by them, the prosecutor must show that his account is false; as if he says that he bought the goods of a certain person, naming him, such person must be called, if known to be a real person, to show that such statement was false.⁴ Otherwise if he gives a conflicting or unreasonable account of how he came by them.⁵ The mere possession of goods which have been actually lost does not even furnish *prima facie* proof of guilt.⁶ Nor can a person be called upon to explain his possession of property until it is proved that it was stolen.⁷ The presumption of guilt of the accused, raised by his being found in the possession of stolen property, does not require him to show to the reasonable satisfaction of the jury that he became possessed of such property, otherwise than by stealing it, for the evidence may fall far short of this and yet create a reasonable doubt of his guilt,⁸ which is all that the law requires.⁹

¹ Barb. Cr. L., 184; 2 East P. C., 655; Cockin's Case, 2 Lewin, 235; Warren v. State, 1 Green, 106; Com. v. Montgomery, 11 Met., 534; Rex v. Partidge, 7 Car. & P., 551.

² Com. v. Millard, 1 Mass., 6; People v. Ball, 4 C. H. Rec., 118, 139; State v. Brady, 27 Iowa, 126; 1 Tyler, 379; Com. v. Montgomery, 11 Met., 534.

³ Conkwright v. People, 35 Ills., 204.

⁴ 3 Greenl. Ev., § 161; Reg. v. Crowhurst, 1 Car. & K., 370; R. v. Hall, 1 Cox C. C., 231; State v. Furlong, 19 Me., 225; *contra*, State v. Brown, 25 Iowa, 561.

⁵ 2 Arch. C. P. & Pl., 399; State v. Clark, 4 Strob., 311.

⁶ Hunt v. Com., 13 Grat., 757.

⁷ People v. Caniff, 2 Park. Cr. R., 586; Long v. State, 1 Swan. Tenn., 287; State v. Furlong, 19 Me., 225; State v. Taylor, 25 Iowa, 274; Rex v. Yend, 6 Car. & P., 176.

⁸ State v. Merrick, 19 Me., 398.

⁹ Hall v. State, 8 Ind., 439; State v. Merrick, 1 App., 398; State v. Bennett, 3 Brev., 514; Heed v. State, 25 Wis., 421.

§ 511. **Association with Thieves — Evidence of Other Larcenies — Poverty of Defendant — False Statements, etc.** — Association with horse thieves or a subsequent confederation to steal horses is not admissible evidence on a prosecution for stealing specified horses.¹ And the presumption of guilt cannot be raised by showing that the defendant is guilty of other larcenies.² Proof that the person charged with larceny was poor, and that for years before had not been the owner of property to the amount alleged to be stolen; that he had made false statements as to where he obtained the property; that when selling it he called himself by the wrong name, and that he did not or could not give any account of how he came by the property, has no tendency to prove the ownership of the property as alleged.³

§ 512. **Evidence of the Wealth or Poverty of the Accused Inadmissible.** — Evidence that the accused was rich⁴ or poor⁵ at the time the larceny is alleged to have been committed is usually inadmissible either for or against him. Yet there are circumstances in which evidence that the accused was destitute of money is admissible against him.⁶

§ 513. **Production of Stolen Property in Court.** — The stolen property may be produced in court and be shown to the jury.⁷ But there is no legal necessity for it to be in court. And if it is a written instrument, parol evidence of its contents may be given without accounting for its non-production or having given notice to the defendant to produce it.⁸

§ 514. **What not a Defense.** — It is not a good defense to an

¹ *Cherry v. State*, 7 Ohio, 222.

² *Walker v. Com.*, 1 Leigh, 574; *State v. Danbert*, 42 Mo., 242; *Smith v. State*, 10 Ind., 106.

³ *State v. Furlong*, 19 Me., 225; see *Gates v. People*, 14 Ills., 434.

⁴ *Com. v. Stebbins*, 8 Gray, 492, 496.

⁵ *State v. Furlong*, 19 Me., 225.

⁶ *Com. v. Montgomery*, 11 Met., 534.

⁷ *State v. Lull*, 37 Me., 246.

⁸ *Com. v. Messenger*, 1 Bin., 273; *Moore v. Com.*, 2 Leigh, 701; *McGinnis v. State*, 24 Ind., 500; *Reg. v. Brennan*, 3 Crawf. & Dix C. C., 109, 110; *People v. Holbrook*, 3 John., 90.

indictment for stealing intoxicating liquors, that the liquors stolen were kept in violation of the law.¹

6. MALICIOUS MISCHIEF.

§ 515. **To Railroads.** — “Whoever willfully and maliciously displaces or removes any switch, signal or rail of any railroad, or breaks down, rips up, injures or destroys any track, bridge or other portion of any railroad, or places any obstructions thereon, or places any false signal upon or along the line of any railroad track, or does any act to any engine, machine, or car of such railroad, with intent that any person or property being or passing on or over such railroad should be injured thereby, shall be imprisoned in the penitentiary not less than one nor more than five years. Or if, in consequence of any such act, done with any such intent, any person being or passing on or over such railroad suffers any bodily harm, or any property is injured, the person so offending shall be imprisoned in the penitentiary not less than three nor more than ten years. And if, in consequence of any such act, done with such intent, any person is killed, the person so offending shall be deemed guilty of murder and punished accordingly.”²

STATEMENT OF THE OFFENSE OF REMOVING A SWITCH WITH INTENT TO INJURE A PERSON.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, feloniously, willfully and maliciously did remove a certain switch of a railroad called (*insert name of the road*), there situate, with intent³ that a person, to wit., the said A. B., then and there being, passing on and over

¹ State v. May, 20 Iowa, 305.

² R. S., 379, § 186; Com. v. Killan, 109 Mass., 343. It is no defense to an indictment for obstructing a railroad that the defendant owned the land over which the road passed, and had never released the right of way to the same. State v. Hessenkamp, 17 Iowa, 26.

³ It is not necessary to allege in an indictment or prove upon the trial that the obstruction, willfully or maliciously placed upon the track of a railroad company, actually did obstruct or hinder its trains. State v. Clemens, 38 Iowa, 257; but an indictment is bad which does not aver that the act charged was done with criminal intent. Com. v. Bakeman, 105 Mass., 58.

the said railroad, should then and there be injured thereby, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 516. **Combining to Injure Railroads.** — “If any two or more persons shall conspire or combine to break down, take up, injure or destroy any railroad track, or railroad bridge, or to burn or destroy any engine, engine-house, car-house, machine-shop, or any other building or machinery necessary to the free use of any railroad, every such person shall be punished by imprisonment in the penitentiary not less than two or more than five years.”¹

STATEMENT OF THE OFFENSE OF COMBINING TO TAKE UP A RAILROAD TRACK.

(*Commence as in form on page 35*) that C. D. and E. F., on, etc., at, etc., in the said county, feloniously did conspire and combine to take up, injure and destroy a certain railroad track of a railroad called (*insert the name of the railroad*), there situate, which said railroad track was then and there necessary for the free use of the said railroad, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 517. **Obstructing Train Laden with Munitions of War, Troops, etc.** — “If any two or more persons shall attempt to prevent the passage of any railroad train carrying any provisions, troops or munitions of war, for the use or in the employment of this state or of the United States, by any violence or offer of violence, or shall assemble themselves together for that purpose, or if any person shall induce, entice or persuade, or attempt to induce, entice or persuade, any other person to do so, such persons, and each of them, shall be imprisoned in the penitentiary not less than one nor more than ten years.”²

STATEMENT OF THE OFFENSE OF ATTEMPTING TO STOP TRAIN CARRYING MUNITIONS OF WAR.

(*Commence as in form on page 35*) that C. D. and E. F. feloniously did attempt by violence to prevent the passage of a certain railroad train, on the railroad called (*insert the name of the railroad*) there situate, then and there carrying provisions, troops, and munitions of war, contrary to the form of the statute in such case made and provided² (*conclude as in form on page 35*).

¹ R. S., 390, § 187.

² Id., § 188.

§ 418. **Attempting Injury to Railroads.** — “Whoever shall maliciously make any attempt, although the same may not succeed, to place obstructions on any railroad track, to burn, blow up, or destroy any railroad bridge, or in any other way prevent the free and safe passage of trains on any railroad, shall be imprisoned in the penitentiary not less than one nor more than ten years.”¹

STATEMENT OF THE OFFENSE OF ATTEMPTING TO INJURE A RAILROAD.

(Commence as in the form on page 35) that C. D., on, etc., at, etc., in the said county, feloniously and maliciously did make an attempt, although the same did not succeed, to place obstructions on the railroad track of a certain railroad called (*insert the name of the road*) there situate, contrary to the form of the statute in such case made and provided (*conclude as in the form on page 35*).

§ 519. **Influencing Others to Injure Railroads.** — “Whoever shall maliciously hire, persuade or induce, attempt to hire, induce or persuade, any person to burn, or in any way injure or destroy, any railroad bridge, to take up, injure or destroy any railroad track, or any machine-shop, engine-house, car-house, engine or car, or other machinery or property necessary for the operation of any railroad, shall be imprisoned in the penitentiary not less than one nor more than ten years.”²

STATEMENT OF THE OFFENSE OF INFLUENCING OTHERS TO INJURE
RAILROADS.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, feloniously and maliciously did hire, persuade and induce E. F., to take up, injure and destroy the railroad track of a certain railroad called (*insert the name of the road*) there situate, which said railroad track was then and there necessary for the operation of the said railroad, contrary to the form of the statute in such case made and provided (*conclude as in the form on page 35*).

§ 520. **To Houses, etc.** — “Whoever willfully and maliciously destroys, injures or defaces any building or fixture attached

¹ R. S., 380, § 189.

² Id., 380, § 190.

thereto, without consent of the owner, or destroys, injures or secretes any goods or chattels of another, shall be imprisoned in the penitentiary not less than one nor more than ten years: *Provided*, that where the damage done in such case does not exceed fifteen dollars, the punishment shall be by fine not exceeding five hundred dollars, or by imprisonment in the county jail not exceeding one year, or both, in the discretion of the court.”¹

STATEMENT OF THE OFFENSE OF INJURING A BUILDING.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, feloniously, willfully and maliciously did injure and deface a certain building, then and there owned by the said A. B.² there situate, without then and there having the consent of the said A. B., and that the damage then and there done to the said building by the said injury and defacing, exceeds the sum of fifteen dollars, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 521. *To Papers, etc.* — “Every person who shall fraudulently or maliciously tear, burn, efface, cut, or in other way destroy or secrete any deed, lease, bond, will, or any other writing sealed, or any bank bill or note, check, warrant for the payment of money or other thing, or other security for the payment of money or delivery of goods, or any certificate or other public security of this state, or of the United States, or any of them for the payment of money, or any receipt, acquittance, release, defeasance, discharge of any debt, suit or other demand, or any transfer or assurance of money, stock, goods, chattels, or other property, or any letter of attorney or other power, or any day-book or other book of account, or any agreement or contract whatever, with intent to defraud, prejudice or injure any person or body corporate, shall be imprisoned in the penitentiary not less than one year nor more than five years.”³

¹ R. S., 380, § 192. Malicious injury to a church is indictable under this statute. *State v. Brant*, 14 Iowa, 180.

² It is sufficient to aver the ownership without setting out the character of the title or interest. *State v. Brant*, 14 Iowa, 180.

³ R. S., 381, § 194.

STATEMENT OF THE OFFENSE OF TEARING A DEED, ETC.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, feloniously, fraudulently and maliciously did tear a certain deed,¹ whereby the said C. D. conveyed certain real estate therein described to the said A. B., the property of the said A. B., with intent then and there, feloniously and fraudulently, thereby to defraud, prejudice and injure the said A. B., contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

§ 522. To Jails. — “Whoever willfully and maliciously breaks down or destroys, or otherwise injures any public jail, or other place for the confinement of offenders, shall be confined in the county jail not exceeding one year, or fined not exceeding five thousand dollars, nor less than the value of the property destroyed, or both.”²

STATEMENT OF OFFENSE OF THE BREAKING DOWN A PUBLIC JAIL.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, willfully and maliciously did break down the public jail of the said county, and did then and therein thereby injure the said jail to the amount of one hundred dollars, contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

§ 523. To Canals, etc. — “Whoever willfully and maliciously injures, removes or destroys any canal, levee, dam, reservoir, trench, or their appurtenances, or the gear or machinery of any mill or manufactory, draws off the water from any mill-pond, reservoir, canal or trench, destroys or injures any engine or its apparatus for the extinguishment of fires, or any posts, glass caps, wires or other materials used in the construction or operation of any telegraph; removes, injures or destroys any public or toll-bridge, or places any obstruction on such bridge, or on any public road, with intent to injure any persons or property passing thereon, shall be find not exceeding three hundred dollars, or confined in the county jail not

¹ Possibly it may be necessary in an indictment to set forth the instrument in its exact words and figures if the prosecutor is able to do so or to excuse the omission by the proper averments, 2 Arch. C. P. & Pl., 801, and authorities.

² R. S., 381, § 195.

exceeding one year, or both. This section, so far as it relates to roads and bridges, is cumulative to other remedies provided by law.”¹

STATEMENT OF THE OFFENSE OF REMOVING A DAM OF A MILL-POND.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, willfully and maliciously did remove the dam and draw off the water from a certain mill-pond appurtenant to the mill of the said A. B. there situate, contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

§ 524. To Rafts, Vessels, etc. — “Whoever willfully and maliciously, without the consent of the owner, cuts away, lets loose, injures or destroys any boom, raft of logs, or other lumber, vessel, scow or boat of any kind, fastened to any place, of which he is not the owner or legal possessor, shall be fined not exceeding one thousand dollars, or confined in the county jail not exceeding one year, or both; and shall also be liable to the person injured, in an action of trespass, in double the damages sustained.”²

STATEMENT OF THE OFFENSE OF LETTING LOOSE A RAFT.

(Commence as in the form on page 35) that C. D., on, etc., at, etc., in the said county, willfully and maliciously did cut away and let loose a certain raft of logs, then and there fastened to a post, and then and there owned by the said A. B., without then and there having the consent of the said A. B., contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

§ 525. Obstructing of Stream or Water Course. — “Whoever willfully and wantonly obstructs the passage of any stream or water-course, used for the purpose of rafting or floating mill-logs or lumber, by casting, felling or depositing any tree, timber or other thing across or into any such stream or water-course, whereby the rafting or the floating of mill-logs or lumber is prevented, hindered or impeded, shall be fined not exceeding five hundred dollars, or confined in the county jail not exceeding six months, or both. But nothing herein

¹ R. S., 381, § 197.

² Id., § 198.

contained shall prevent the maintaining or constructing of dams for manufacturing or other lawful purposes.”¹

STATEMENT OF THE OFFENSE OF OBSTRUCTING A WATER-COURSE.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, willfully and wantonly did obstruct the passage of a certain stream and water-course, then and there used for the purpose of rafting and floating mill-logs and other lumber, by then and there casting and falling a tree across and into the said stream and water-course, whereby the rafting and floating of mill-logs and other lumber was then and there prevented, hindered and impeded, contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

§ 526. To Monuments. — “Whoever willfully and maliciously injures or removes any monument erected, or tree marked as a boundary of any land, or as a state, county, city, town or village boundary, destroys, defaces or alters the marks thereon made for the purpose of designating such boundary, injures or defaces any mile-stone or guide-board erected on any public way or railroad, removes, defaces or injures any sign-board, lamp or lamp-post, or extinguishes any lamp on any bridge, street-way or passage, shall be confined in the county jail not exceeding one year, and fined not exceeding one hundred dollars.”¹

STATEMENT OF THE OFFENSE OF REMOVING A BOUNDARY.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, willfully and maliciously did remove a certain tree marked as a boundary of certain land of the said A. B., there situate, contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

§ 527. To Shrubs, Fences, etc. — “Whoever willfully and maliciously cuts down, destroys or otherwise injures any shrub, vine or tree, for ornament or use, whether standing or growing upon the lands of another, or upon any street, road or public ground adjoining such land, breaks or defaces any fence, hedge or ditch used as a fence, throws down or opens any

¹ R. S., 381, § 199.

¹ Id., § 200.

gate or bars, injures, destroys or severs from the land of another any product thereof, or thing attached thereto, such article not being his own, shall be confined in the county jail not exceeding one year, or fined not exceeding two hundred dollars, or both, and shall be liable to the person injured in double the amount of damages done.”¹

STATEMENT OF THE OFFENSE OF MALICIOUSLY CUTTING A TREE.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, did willfully and maliciously cut down a certain tree, then and there for ornament and use, standing and growing upon the land of the said A. B., such tree then and there not being the property of the said C. D., contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

§ 528. To Water, etc. — “Whoever willfully and maliciously defiles, corrupts or makes impure any spring, or other source of water, or reservoir, or destroys or injures any pipe, conductor of water, or other property pertaining to an aqueduct, or aids and abets in any such trespass, shall be fined not exceeding one thousand dollars, or confined in the county jail not exceeding one year.”²

STATEMENT OF THE OFFENSE OF CORRUPTING A SPRING.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, willfully and maliciously did defile, corrupt, and make impure a certain spring of water there situate on the premises of the said A. B., contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

§ 529. To Domestic Animals. — “Whoever willfully and maliciously kills, wounds, maims, disfigures³ or poisons any domestic animal, or exposes any poisonous substance, with intent that the life of any such animal should be destroyed

¹ R. S., 382, § 201; *Salter v. People*, 59 Ills., 68; *State v. McDermott*, 36 Iowa, 107.

² R. S., 382, § 202.

³ The maiming of a domestic animal implies some permanent injury; the disfiguring of such an animal implies a lower grade of offense and embraces any injury however slight, which is of a character to lessen the value of the animal. *State v. Harris*, 11 Iowa, 414.

thereby, such animal being the property of another, shall be imprisoned in the penitentiary not less than one nor more than three years, or fined not exceeding one thousand dollars, or both: *Provided*, that this section shall not be construed to apply to persons owning sheep or other domestic animals who may, in the exercise of reasonable care and good intentions, put out poison on his own premises where sheep are kept, to kill sheep-killing dogs.”¹

STATEMENT OF THE OFFENSE OF MALICIOUSLY KILLING A HORSE.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, willfully and maliciously did² kill a certain domestic animal,³ *to wit.*, a horse, the property of the said A. B., contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 530. **Taking Horses, Vehicles, Boats, etc.** — “Whoever willfully and maliciously takes, drives, rides or uses any horse, ox or other draft animal, or takes or uses any vehicle or boat, the property of another, without the consent of the owner or person having the legal custody, care and control of the same, shall be fined not exceeding three hundred dollars, or be confined in the county jail not exceeding one year. But the provisions of this section shall not apply to any case of taking the property of another with intent to steal the same.”⁴

STATEMENT OF THE OFFENSE OF MALICIOUSLY TAKING A HORSE.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, willfully and maliciously did take and use a certain horse then and there owned by the said A. B., without then and there having the consent of the said A. B. or of any person then and there having the legal custody, care or control of the same, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

¹ R. S., 382, § 203; *Com. v. McLaughlin*, 105 Mass., 460.

² Using the words “did maim and disfigure,” does not make a count in an indictment bad for duplicity. *State v. Harris*, 11 Iowa, 414.

³ It is probably unnecessary to allege that the animal was a domestic animal, where the kind of animal is specified. *State v. Enslow*, 10 Iowa, 115; *Com. v. McClellan*, 102 Mass., 34.

⁴ R. S., 382, § 204. *Smith v. Donnelly*, 66 Ills., 466

§ 531. **The Common Law Offense of Malicious Mischief.** — Malicious mischief at common law was a misdemeanor,¹ and was defined to be the willful destruction of some article of personal property from actual ill-will or resentment to the owner,² and seems to have had a more extended signification including injuries to real estate,³ such as defacing tombs, sepulchres or monuments for the dead,⁴ tearing up and carrying away copper affixed to the freehold,⁵ and the stealing of records which concern the realty.⁶ So at common law this offense does not seem to have been confined to injuries to property. Injuries to the person of a mischievous and wanton nature were indictable. To put cow-itch upon a towel or in a tub used for bathing was held to be an act indicating a mischievous intent and therefore indictable.⁷ Casting spirits of vitriol, aquafortis or any other powerful acid substance upon the person or clothes of another, to the injury of either, was also indictable.⁸

§ 532. **Malice — As to the Liability of a Wife.** — At common law malice against the animal killed or injured was not sufficient to complete the offense, for malice against the owner was necessary.⁹ But under our statute it is sufficient if the animal is willfully and maliciously killed or injured.¹⁰ Therefore if the owner of land injures or kills cattle trespassing upon it, he is liable under the statute to indictment for malicious mischief though he has no malice against the owner.¹¹ It

¹ *Loomis v. Edgerton*, 19 Ills., 419.

² *State v. Robinson*, 3 Dev. & Bat., 130; *State v. McDermott*, 36 Iowa, 107.

³ 3 Inst., 202; *Loomis v. Edgerton*, 19 Wen., 419; *contra*, *Brown's Case*, 3 Greenl. R., 177; *State v. Helms*, 5 Ired., 364; *State v. Robinson*, 3 Dev. & Bat., 130; *State v. Burroughs*, 2 Halst., 426.

⁴ 3 Inst., 202.

⁵ *Rex v. Joiner*, J. Kel., 29.

⁶ *Rex v. Westbeer*, 2 Stra., 1133, 1 Leach, 12.

⁷ *People v. Blake*, 1 Wheeler Cr. C., 490.

⁸ *Lewis Cr. L.*, 504; *People v. Gilmore*, 2 City Hall Rec., No. 2, p. 5.

⁹ 2 Bish. Cr. L., § 996; *Com. v. Walden*, 3 Cush., 561; *Com. v. Williams*, 110 Mass., 402; see *State v. McDermott*, 36 Iowa, 107.

¹⁰ R. S., 382, § 203.

¹¹ *Snap v. People*, 19 Ills., 80.

has been held that a wife could not commit this offense on her husband's property;¹ possibly she could under our statute. To cut the hair from the tail of a horse or to cut off his mane is to disfigure him.² When the consequences which would naturally follow any act are criminal and mischievous, the law implies that the party acted with a malicious intent.³ Malice may be inferred from the act or the manner of committing of the offense or by its repetition, or by the relation existing between the defendant and the owner of the property injured, but not from the relation existing between the family in which he lived and the owner of such property.⁴

7. ALTERING AND DEFACING MARKS AND BRANDS WITH INTENT TO STEAL, ETC.

§ 533. Provisions of the Statute. — "Every person who shall mark or brand, alter or deface the mark or brand, of any horse, mare, colt, jack, jennet, mule or any one or more head of neat cattle or sheep, goat, hog, shoat or pig, the property of another, with intent thereby to steal the same, or to prevent identification thereof by the true owner, if the value thereof is fifteen dollars or more, shall be imprisoned in the penitentiary not less than one nor more than three years; if the value is less than fifteen dollars, he shall be confined in the county jail not exceeding one year, or fined not exceeding one thousand dollars, or both."⁵

STATEMENT OF THE OFFENSE OF ALTERING THE MARK OF A SHEEP.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, feloniously did alter and deface the mark of a certain sheep of the value of fifty dollars, the property of the said A. B., with intent thereby then and there feloniously to steal, take and carry away the same, contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

¹ Anon., 6 Mod., 88.

² Boyd v. State, 2 Humph., 39.

³ State v. Hessenkamp, 17 Iowa, 25; Com. v. Bakeman, 105 Mass., 53.

⁴ State v. McDermott, 36 Iowa, 107.

⁵ R. S., 382, § 206.

8. RECEIVING AND RESTORING STOLEN PROPERTY.

§ 534. Provisions of the Statute as to Receiving. — “Every person who, for his own gain, or to prevent the owner from again possessing his property, shall buy, receive or aid in concealing stolen goods, or any thing the stealing of which is declared to be a larceny, or property obtained by robbery or burglary, knowing the same to have been so obtained, shall be imprisoned in the penitentiary not less than one nor more than ten years, or if such goods or other property or thing does not exceed the value of fifteen dollars, he shall be fined not exceeding one thousand dollars, and confined in the county jail not exceeding one year.”¹

§ 535. Provisions of the Statute as to Second Offense. — “Whoever, after having been convicted of the offense of buying, receiving or aiding in the concealment of stolen money, goods or any property, the stealing of which is declared to be larceny or property obtained by robbery or burglary, if he be again convicted of a like offense; or whoever, at the same term of court, is convicted of three distinct acts of buying, receiving, or aiding in the concealment of stolen property, or property obtained by robbery or burglary, knowing that the same was so obtained, shall be imprisoned in the penitentiary not less than two nor more than fifteen years.”²

§ 536. Procedure. — “In any prosecution for the offense of buying, receiving or aiding in the concealment of stolen property, or property obtained by robbery or burglary, knowing that the same was so obtained, it shall not be necessary to aver nor to prove on the trial that the person who stole, robbed or took the property, has been convicted.”³

§ 537. Provisions of the Statute as to Receiving Property of a Railroad Company. — “If any person shall purchase or receive for sale from any other person any link, pin, bearing, journal or other article of iron, brass or other metal, which has been

¹ R. S., 388, § 239.

² Id., 389, § 240.

³ Id., § 242.

manufactured and is used exclusively for railroad purposes, and which shall have stamped thereon the name of some railroad company, or the initial letter thereof, without the consent in writing of the president, general manager or general superintendent of such railroad company, such person shall be fined in a sum not less than one hundred dollars nor more than five hundred dollars, and be imprisoned not less than ten days nor more than ninety.”¹

§ 539. Provisions of the Statute as to Restoring Stolen Goods. — “All property obtained by larceny, robbery or burglary, shall be restored to the owner, and no sale, whether in good faith on the part of the purchaser or not, shall divest the owner of his right to such property. Such owner may maintain his action, not only against the felon, but against any person in whose possession he may find the same.”²

STATEMENT OF THE OFFENSE OF RECEIVING STOLEN GOODS.

(Commence as in form on page 35) that C. D., on, etc., at, etc. in the said county, feloniously,³ unlawfully and unjustly, for his own gain⁴ did buy⁵ two coats⁶ of the value of ten dollars each, and one hat of the value⁷ of five

¹ R. S., 389, § 242.

² Id., § 243.

³ Under a somewhat similar statute of another state, the word “feloniously” was held necessary. *People v. Johnson*, 1 Park. Cr. R., 564.

⁴ Necessary, 3 Chitty Cr. L., 939, 991; or the words “to prevent the owner from again possessing his property” should be used, R. S., 333, § 239; 2 Arch. C. P. & Pl., 235.

⁵ It is not necessary to allege that there was any consideration passed between the thief and the receiver. *Hopkins v. People*, 12 Wen., 76. The name of the person from whom the goods were bought or received need not be stated, *State v. Hazzard*, 3 R. I., 474.

⁶ The goods must be accurately described, for a variance between the proof and the description as to all of them will be fatal. *People v. Wiley*, 3 Hill, 194, 212.

⁷ The value of the stolen property should be stated in an indictment, and must be found by the verdict, *Sawyer v. People*, 3 Gilm., 53; *State v. Watson*, 3 R. I., 114; *O’Connell v. Com.*, 7 Met., 460.

dollars, of the goods and chattels of E. F., then¹ lately before feloniously stolen, taken and carried away² from the said E. F., by a certain evil disposed person³ (*or* "*by G. H.*") the said C. D.,⁴ then and there well knowing⁵ the said goods to have been feloniously stolen⁷ (*conclude as in form on page 35*).

§ 539. **Evidence Required — Guilty Knowledge.** — It is necessary to prove: 1, the larceny; 2, the receiving or concealing of the whole or a part⁸ of the goods alleged to have been received into the actual custody of the prisoner; 3, that the defendant knew the goods to have been stolen at the time he received them.⁹ This guilty knowledge may be proved by the admissions or acts of the prisoner, or by proof of any facts from which it may be inferred.¹⁰ As if the prisoner receive

¹ The name of the owner of the stolen property must be stated and be proved as stated, for a variance in this respect will be fatal, *State v. McAloon*, 40 Me., 133; *State v. Williams*, 2 Strob., 229.

² The time or place where the goods were stolen need not be alleged, 2 Arch. C. P. & Pl., 655; *Holford v. State*, 2 Blackf., 103; *State v. Murphy*, 6 Ala., 815; *Rex v. Scott*, 2 East P. C., 780.

³ The words "taken and carried away from the said E. F. by a certain evil-disposed person" are sometimes omitted, *H. T.*, 387; *Barb. Cr. L.*, 689; but they are usually inserted in indictments. 2 Arch. C. P. & Pl., 656; 3 Chitty Cr. L., 989.

⁴ The name of the thief need not be stated nor that it is unknown. *People v. Caswell*, 21 Wen., 86; *State v. Murphy*, 6 Ala., 845; *Rex v. Jervis*, 6 Car. & P., 156; *Com. v. State*, 11 Gray, 60; but it is proper to state the facts according to the truth, *Rex v. Thomas*, 2 East P. C., 731; yet if the name is stated it must be proved as alleged, 2 Bish. Cr. P., § 982; *Com. v. King*, 9 Cush., 284; *contra*, *State v. Coppenberg*, 2 Strob., 273; *People v. Caswell*, 21 Wen., 86; *Rex v. Pulham*, 9 Car. & P., 280; see *Rex v. Messingham*, 1 Moody, 257.

⁵ The words "the said C. D." have been held to be surplusage. *R. v. Morris*, 1 Leach, 109.

⁶ The guilty knowledge must be alleged and proved. *Rex v. Kernon*, 2 Russ. on C., 251; *Reg. v. Larkin*, Dears C. C., 335, 2; *Engl. L. & Eq.*, 572.

⁷ It is not necessary to add the words "taken and carried away." *Com. v. Wilde*, 5 Gray, 83; nor that the principal has been convicted. *R. S.*, 389, § 241; *contra*, *State v. McAloon*, 40 Me., 133.

⁸ *State v. Watson*, 3 R. I., 114; *People v. Wiley*, 3 Hill, 194; *Upton v. State*, 5 Iowa, 465.

⁹ *Rex v. Kernon*, 2 Russ. on C., 251; *Reg. v. Larkin*, 2 Eng. L. & Eq., 572; *Durant v. People*, 13 Mich., 351.

¹⁰ 2 Arch. C. P. & Pl., 628, 662; *Collins v. State*, 33 Ala., 434.

watches, jewelry, large quantities of money, bundles of cloths of various kinds, or movables of any sort to a considerable value, from boys or other persons destitute of property and without any lawful means of acquiring them; and especially if it be proved that they were bought at untimely hours or under circumstances of evident concealment.¹ Buying goods at under value is presumptive evidence that the buyer knew they were stolen.² The effacing of the marks on goods, the buying of a large amount, receiving them from a stranger, throwing them into a trunk, being found in a room up stairs in the prisoner's house, though he kept a store, is evidence of a guilty knowledge.³ So a guilty knowledge may be inferred from the prisoner's having concealed, or endeavored to conceal, the goods.⁴ As if they are found in the prisoner's store in a place convenient for concealment, or a considerable amount of stolen property is found in a room up stairs, and the prisoner on being questioned gives no satisfactory account of them.⁵ So evidence may be given of the prisoner at different times having received several stolen articles of the same person from whom he received the goods in question, in order to show a guilty knowledge in receiving at least such receipts as were prior to those charged in the complaint or indictment.⁶ But the prosecutor will not be allowed to prove that at the time his goods were found in the prisoner's possession, goods of other persons of the same description had also been found in his possession, which had previously been stolen, for that is not proof of guilty knowledge.⁷

§ 540. **Evidence of a Want of Guilty Knowledge.** — The following circumstances are evidence of a want of guilty knowl-

¹ Roscoe Cr. Ev., 876.

² 1 Hale P. C., 619; *Jupitz v. People*, 34 Ills., 516; but see *Andrews v. People*, 60 Ills., 354.

³ 1 Arch. C. P. & Pl., 433; *People v. Cochrane*, 1 Wheeler C. C., 84.

⁴ *Wills v. People*, 3 Park. Cr. R., 498; *R. v. Mansfield C. & M.*, 140.

⁵ *People v. Teal*, 1 Wheeler C. C., 199, 201.

⁶ 2 Arch. C. P. & Pl., 668; *Rex v. Dunn*, Ry. & Moody, 146; *Rex v. Davis*, 6 Car. & P., 177; *Rex v. Winkworth*, 4 Car. & P., 444; *contra*, *People v. McNiff*, 1 City H. Rec., 8.

⁷ 2 Arch. C. P. & Pl., 668; *Rex v. Oddy*, 20 L. J., 198 n. m; *contra*, 2 Bish. Cr. P., § 990; *Devoto v. Com.*, 3 Met. Ky., 417.

edge: going out to sell the goods in the daytime; the prisoner stating that he had other goods of the like kind, and offering to be present at an auction sale of them; leaving the original marks on the most of the goods, and after being arrested, aiding in arresting the thief, who refuses to answer on examination.¹ So part of the goods being found in the prisoner's store, open to the view of those who called in, the original letters on a dress box being allowed to remain, by which the owner could identify it, with proof of good character as to honesty² of the prisoner, or the fact of a fair price having been paid, are important circumstances to repel a guilty knowledge.³ But the prisoner will not be permitted to show that though he had an opportunity to escape he did not embrace it,⁴ nor what the person from whom he received the goods said as to the manner in which such person became possessed of the property, as evidence of want of guilty knowledge.⁵

§ 541. *Evidence of Receipt of Goods for Gain, etc.* — 4. It must be proved either that the defendant received the goods for his own gain or to prevent the owner from again possessing his property.⁶ Where a justice of the peace, pursuant to an arrangement with one whom he knew had stolen goods, invited an interview with the owner, and afterwards received the goods under the color of an agency, but really to make a profit out of the larceny by obtaining the whole or a part of a reward given by the owner for their return, it was held that such receiving was for his own gain, and that he was within the statute for receiving stolen goods and properly convicted of such offense.⁷ Being present where stolen property is con-

¹ *People v. Teal*, 1 Wheeler, Cr. C., 199; *People v. Cochrane*, 1 Wheeler Cr. C., 81, 84.

² *Roscoe Jr. Ev.*, 876; *Conkwright v. People*, 35 Ills., 204.

³ *People v. Teal*, 1 Wheeler Cr. C., 199; *Jupitz v. People*, 34 Ills., 516; *Andrews v. People*, 60 Ills., 354.

⁴ *People v. Rathbun*, 21 Wen., 509; *Campbell v. State*, 23 Ala., 28.

⁵ *Wills v. People*, 3 Park. Cr. R., 473.

⁶ R. S., 388, § 239.

⁷ *People v. Wiley*, 3 Hill, 194.

cealed, knowing it to be stolen, and keeping silent and refusing to give information to officers searching for the same, is, when unexplained, conduct sufficient to warrant a conviction, notwithstanding the evidence does not show that the accused was in physical possession of the property secreted.¹

§ 542. **Production of Goods in Court — Testimony of Thief or Accomplice — Accessory.** — It is proper, but not necessary, for the prosecution to introduce a brass coupling with a view to ask the witness as to the similarity between the stolen ones and the one thus produced, and thereby to identify and prove the kind of articles stolen.² The person who stole the goods or an accomplice of the receiver is a competent witness to prove the whole case against the receiver;³ but the confessions of the thief are not evidence against the receiver. The crime of being a receiver of stolen goods is not merged in the offense of being an accessory before the fact of larceny.⁴

9. ROBBERY.

§ 543. **Definition and Punishment.** — “Robbery is the felonious and violent taking of money, goods or other valuable thing from the person of another by force or intimidation. Every person guilty of robbery shall be imprisoned in the penitentiary not less than one year nor more than fourteen years; or if he is armed with a dangerous weapon with intent, if resisted, to kill or maim such person, or being so armed he wounds or strikes him, or if he has any confederate present so armed, to aid or abet him, he may be imprisoned for any term of years or for life.”⁵

¹ State v. St. Clair, 17 Iowa, 149, 19 Iowa, 144.

² Jupitz v. People, 34 Ills., 516.

³ Roscoe Cr. Ev., 877; Com. v. Savory, 10 Cush., 535; *contra*, State v. Pepper, 11 Iowa, 347; State v. Schlagel, 19 Iowa, 169; State v. Moran, 34 Iowa, 453; Com. v. Boyington, 116 Mass., 343.

⁴ State v. Coppenburg, 2 Strob., 273.

⁵ R. S., 390, § 246.

STATEMENT OF THE OFFENSE OF ROBBERY.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in said county, feloniously and violently did make an assault¹ upon the said A. B., and did then and there put the said A. B. in bodily fear and danger of his life,² and against his will,³ then and there⁴ feloniously and violently⁵ by force⁶ (or "*intimidation*"), did steal, take, and carry away from the person⁷ of the said A. B., the property of the said A. B.,⁸ *to wit.*, ten promissory notes of (*insert the name of the bank*) each for the payment of the sum of five dollars of the value of five dollars each (*conclude as in form on page 35*).

§ 544. Evidence of Robbery. — There must be proof, 1. of tak-

¹ At common law an indictment for robbery was required to state an assault upon the person, and that such assault was made feloniously. Russ. on C., 87; 1 Hale P. C., 534; Barb. Cr. L., 142; Rex v. Pelfryman, 2 Leach, 563; 2 East P. C., 733.

² This statement of fear and danger of life is probably unnecessary under our statute, though as such statement was usually inserted in an indictment at common law it will be more safe to insert it, 2 Arch. C. P. & Pl., 522; Rex v. Donolly, 2 East P. C., 715, 783, 793.

³ In Indiana it is not necessary to allege that the taking was against the will of the person robbed. Terry v. State, 13 Ind., 70; *contra*, Rex v. McDaniel, Foster, 121, 128; Kit v. State, 11 Humph., 167; People v. Beck, 21 Cal., 385.

⁴ The words "then and there" are necessary; the word "immediately" instead of these words is too uncertain. 1 Bish. Cr. P., § 409.

⁵ The word "violent" is used by statute in describing the offense, and should be inserted. Barb. Cr. L., 147; 2 Arch. C. P. & Pl., 285, 286; though at common law, it was unnecessary if it appeared upon the whole that the act was committed with violence. 3 Chitty Cr. L., 806; 2 East P. C., 783; 2 Leach, 563.

⁶ Robbery, both by force and intimidation, may be charged in the same count in an indictment. Long v. State, 12 Ga., 293; Byrne v. State, 12 Wis., 519; State v. Bielby, 21 Wis., 204; and it is not necessary to allege that the party robbed was put in fear or intimidation if the robbery was by actual force and violence. Com. v. Clifford, 8 Cush., 215, 217; Com. v. Humphries, 7 Mass., 242; but an indictment for robbery which does not charge a taking either by force or intimidation is bad. Collins v. People, 39 Ills., 233.

⁷ An indictment must aver that the taking was from the person. Kit v. State, 11 Humph., 167; People v. Beck, 21 Cal., 385.

⁸ The name of the owner of the property must be stated correctly. 2 Arch. C. P. & Pl., 522; R. v. Turner, 1 Leach, 536; Reg. v. Buddick, 8 Car. & P., 237; People v. Vice, 21 Cal., 344; but United States treasury notes in the possession of a person may properly be alleged to be the goods and chattels of that person. Collins v. People, 39 Ills., 233.

ing the "money, goods or other valuable thing" of the alleged owner,¹ though the value of the property is immaterial,² provided it be of some value,³ otherwise the offense will be only that of an assault with intent to rob.⁴ But the ownership of the property must be proved as alleged, for a variance in this respect would be fatal;⁵ at least it must appear that the property was not owned by the defendant.⁶

§ 545. **What a Sufficient Taking, etc.** — In proof of the taking it is necessary to show that the robber actually took the goods into his possession⁷ from the peaceable possession of the person robbed;⁸ though if it is in the possession of the robber for ever so short a time it is sufficient.⁹ As if he snatch an ear-ring from a lady's ear, so that the ear is torn in the operation; it is robbery, though it is dropped immediately into the hair and there found by the owner.¹⁰ But if the robber in the struggle with the owner cut the pocket or girdle so that his purse falls to the ground, this is no robbery;¹¹ but if the robber once had the property in his hands, though it was immediately relinquished, the offense is complete.¹²

§ 546. **Taking by Intimidation.** — Not only a taking in fact, but a taking in law, is sufficient to constitute the offense of robbery. It has therefore been held that if thieves attack a man to rob him, and finding little or nothing about him, force him

¹ R. S., 390, § 246; 3 Greenl. Ev., 225; 3 Chitty Cr. L., 801.

² 2 Arch. C. P. & Pl., 506; Russ. on C., 63; Rex v. Bingley, 5 Car. & P., 602.

³ Phipoe's Case, 2 Leach, 673; Rex v. Edwards, 6 Car. & P., 521.

⁴ Reg. v. Morris, 9 Car. & P., 349; Rex v. Clark, Russ. & Ry., 181; Rex v. Bingley, 6 Car. & P., 602.

⁵ 3 Greenl. Ev., § 234; Willis v. People, 1 Scam., 399.

⁶ People v. Vice, 21 Cal., 344.

⁷ 1 Barb. Cr. L., 143; 1 Hale P. C., 508; Rex v. Farrell, 1 Leach C. C., 322.

⁸ 2 Arch. C. P. & Pl., 506; Rex v. Edwards, 6 Car. & P., 521; Rex v. Falls, 5 Car. & P., 508.

⁹ 3 Chitty Cr. L., 802; 1 Leach, 321; Peat's Case, 1 Leach, 228; 2 East P. C., 557.

¹⁰ Rex v. Lapier, 1 Leach C. C., 320; Reg. v. Simpson, 6 Cox C. C., 422; Com. v. Snelling, 4 Bin. 379.

¹¹ 3 Inst., 69; 1 Hale P. C., 533; Rex v. Farrel, 1 Leach C. C., 322.

¹² 3 Greenl. Ev., § 225; Com. v. Snelling, 4 Bin. 379.

by menace of death to swear to fetch them money, which he does accordingly, and delivers it to them while the menace continues upon him, and they receive it, this is a sufficient taking in law.¹

§ 547. 2. The Taking must be Shown to be felonious and Violent by either Force or Intimidation. — There must be a felonious intent, that is, a criminal intent to commit the crime of robbery.² There must be a felonious intent with regard to the goods alleged to have been taken, for it is not enough that the prisoner had at the same time an intent to steal or rob the owner of other goods.³ Though the party takes the goods with violence, by force or intimidation, yet if it be under a *bona fide* claim of ownership, it is not robbery;⁴ and when the taking was violent and by force, the payment of the full value of the goods was held to be a circumstance from which the jury might or might not infer want of a felonious intent.⁵

§ 548. Violent Taking by Force or Intimidation. — It is a sufficient violent taking by force if the robber takes the goods from the owner against his will after a violent struggle for the possession,⁶ or after the owner has been knocked down for that purpose and while he is senseless.⁷ It is sufficient evidence of a violent taking by intimidation that the money or goods of the owner were obtained by putting him in fear of injury to his person,⁸ to his child,⁹ to his property¹⁰ or to his reputation,¹¹ as

¹ 3 Inst., 68; 1 Hale P. C., 532; 2 East P. C., 714.

² Roscoe Cr. Ev., 894; Rex v. Hawkins, 3 Car. & P., 392; Rex v. Fallows, 5 Car. & P., 508; Long v. State, 12 Ga., 293.

³ Roscoe Cr. Ev., 894; Anon., 2 East P. C., 662.

⁴ Hall's Case, 3 Car. & P., 409.

⁵ Roscoe Cr. Ev., 901; 2 East P. C., 661, 662.

⁶ 2 Arch. C. P. & Pl., 509; Moore's Case, 1 Leach, 334.

⁷ Foster, 128; McDaniel v. State, 8 Sm. & M., 401; Rex v. Lapier, 1 Leach, 320.

⁸ Roscoe Cr. Ev., 902; Foster, 128; Hughes' Case, 1 Lew., 301.

⁹ 2 Arch. C. P. & Pl., 511; Donnelly's Case, 2 East P. C., 718; Rean's Case, 2 East P. C., 735; 3 Greenl. Ev., § 232.

¹⁰ Rex v. Brown, 2 East P. C., 731; Rex v. Simons, 2 East P. C., 731; Rex v. Astley, 2 East P. C., 729; Rex v. Winkworth, 4 Car. & P., 444; Rex v. Spencer, 2 East P. C., 712, 713.

¹¹ 3 Greenl. Ev., § 234

by presenting a weapon to a man and demanding his money,¹ or by assaulting a party in any other way under such circumstances of terror as to cause him through fear to deliver up to the robber his money or other property;² or by threatening to pull down a man's house,³ or drown his child,⁴ unless he gives a mob a sum of money, which through fear he does; or by threatening to accuse and prosecute him for sodomy unless a certain sum of money is paid, whereby, through fear of injury to his character or of losing his place, the party is induced to give the robber such sum of money, which he receives.⁵ It is immaterial whether the party is guilty of the crime or not, for it was the duty of the prisoner to have arrested him and not have robbed him.⁶ But if the property is obtained by threatening to accuse him of any other crime than sodomy, it is doubtful whether it would amount to robbery or not.⁷ Obtaining money by threats of a criminal prosecution for passing counterfeit money has been held insufficient to make the offender guilty of robbery.⁸ If the party is sufficiently put in fear by the acts of the prisoner or his companions, no words of menace are required to be shown;⁹ as if he asks alms with a drawn sword,¹⁰ or by a similar intimidation takes goods under a color of purchase,¹¹ or obtains a loan of money, or the like;¹² for under such circumstances a request for a gift, a sale or a loan of money is equivalent to the most positive demand,

¹ 2 Arch. C. P. & Pl., 510, 511; U. S. v. Wood, 3 Wash. C. C., 440; U. S. v. Wilson, 1 Baldw., 78.

² 2 Bish. Cr. L., § 1164.

³ Rex v. Simons, 2 East P. C., 231; Rex v. Asterly, 2 East P. C., 712; Rex v. Brown, 2 East P. C., 731.

⁴ Arch. C. P. & Pl., 511.

⁵ 2 Bish. Cr. L., § 1172; Rex v. Jones, 2 East P. C., 714, 1 Leach, 139; People v. McDaniels, 1 Park. Cr. R., 198; Rex v. Donnally, 1 Leach, 193.

⁶ 3 Greenl. Ev., § 234; Rex v. Gardiner, 1 Car. & P., 479.

⁷ Butt v. State, 7 Humph., 45; Long v. State, 12 Ga., 293.

⁸ Butt v. State, 7 Humph., 45.

⁹ Roscoe Cr. Ev., 900.

¹⁰ 3 Greenl., § 231; 3 Chitty Cr. L., 805.

¹¹ 2 East P. C., 712; Roscoe Cr. Ev., 900, 901.

¹² 2 Arch. C. P. & Pl., 507; Rex v. Donnally, 1 Leach, 196.

and if anything is obtained in consequence, such a taking will be within the definition of robbery.¹ So there may be a sufficient putting in fear to make the taking robbery where the property is taken from the owner under color of legal proceedings.² In all cases the fear must be shown to have continued upon the party at the time he parted with his goods;³ and if he parted with them before the fear was produced, the taking will not be robbery.⁴ The means used to put the party in fear the law considers as constructive violence so as to make it a violent taking within the meaning of the statute, though there be no actual violence physically applied.⁵

§ 549. **The Degree of Force or Intimidation Required to Constitute Robbery** must be sufficient to overcome the power of the owner to retain possession of his goods or induce him to part with his property against his will;⁶ as where the prisoner suddenly seized the watch of a stranger with violence enough to break a silk ribbon watch-guard half an inch wide about his neck and exclaimed, "Damn you, I will have your watch," and fled with it, pursued by the stranger, it was held to be robbery, though the stranger could not swear that he feared anything but the loss of his watch.⁷ Or where the robber took a man by the cravat and squeezed him against the wall, and in the meantime abstracted his watch from his fob, without his knowledge, it was held to be robbery, though the owner was not afraid nor aware of the robber's intent.⁸ So it has been held to be robbery where the degree of violence used was sufficient to cause a personal injury—as by tearing

¹ 2 Russ. on C., 64; Barb. Cr. L., 194; 4 Black. Com., 242.

² 2 East P. C., 709; 1 Leach, 280; 3 Greenl. Ev., 230.

³ 3 Greenl. Ev., § 231; Long v. State, 12 Ga., 293; Rex v. Jackson, 1 East P. C., 711, 712, 1 Leach, 193.

⁴ 2 Arch. C. P. & Pl., 508; Rex v. Harman., 2 East P. C., 736.

⁵ 2 Arch. C. P. & Pl., 510; Rex v. Donnally, 1 Leach, 196, 197, 2 East P. C., 727; Long v. State, 12 Ga., 293.

⁶ 3 Greenl. Ev., §§ 229, 231; Roscoe Cr. Ev., 901, 902; Foster Cr. L., 128; Long v. State, 12 Ga., 293.

⁷ Rex v. Mason, Russ. & Ry., 418; State v. McCune, 5 R. I., 60; Rex v. Davis, 2 East P. C., 709.

⁸ Com. v. Snelling, 4 Bin., 379.

the ear in plucking away an earring,¹ or the hair, in snatching out an ornament from the head.² But where it appears that the article was taken without any sensible or material violence to the person, or any intimidation, as snatching a hat from the head, or a cane or an umbrella from the hand of the owner rather by a slight-of-hand or adroitness than by open violence with any struggle, it has been held not to be robbery, but larceny from the person.³ The statute requires either force or intimidation to make the offense complete.⁴ If force is used, then there need be no intimidation or fear in fact⁵ but where there is no intimidation or fear, force must be used or there is no robbery.⁶

§ 550. 3. The Goods must be Proved to have been Taken "from the Person" of the party robbed.⁷ To constitute the offense of robbery they must be completely removed from the person; removal, from the place where they were, if they remain throughout with the person, is not sufficient.⁸ It is not necessary that they should be taken from off the person of the prosecutor; if they are under his personal care and in his personal custody and taken in his presence, it is sufficient.⁹ Therefore, if a robber, having first assaulted the owner, take away his horse standing near him,¹⁰ or having put him in fear, drives away his cattle,¹¹ or takes his purse, which the owner, to save it

¹ *Rex v. Lapier*, 1 Leach, 320; 2 East P. C., 557, 708.

² *Rex v. Moore*, 1 Leach, 335.

³ 3 Greenl. Ev., § 229; *Rex v. Steward*, 2 East P. C., 702; *Rex v. Reane*, 2 East P. C., 734; *State v. John*, 5 Jones, 163; *Reg. v. Walls*, 2 Car. & K., 214.

⁴ R. S., 390, § 246; 2 East P. C., 665, 666; 2 Bish. Cr. L., § 1174; *McDaniel v. State*, 8 Sm. & M., 401.

⁵ *McDaniel v. State*, 8 Sm. & M., 401, 418; *State v. Cowen*, 7 Ired., 239; *Com. v. Humph.*, 7 Mass., 242; *Com. v. Clifford*, 8 Cush., 215, 217; *Com. v. Snelling*, 4 Bin., 379.

⁶ *Rex v. Francis Comyns*, 478; *Long v. State*, 12 Ga., 293; *McDaniel's Case*, 19 Howell St. Tr., 746, 806; *Seymour v. State*, 15 Ind., 288.

⁷ R. S., 390, § 246; 3 Greenl. Ev., 228; *Kit v. State*, 11 Humph., 167.

⁸ 3 Chitty Cr. L., 802; 1 Ry. & Moody, 78.

⁹ *Roscoe Cr. Ev.*, 896; 2 Arch. C. P. & Pl., 529; 3 Greenl. Ev., § 228; 2 Bish. Cr. L., §§ 1177, 1178; *U. S. v. Jones*, 3 Wash. C. C., 209.

¹⁰ 2 Hale P. C., 593; 1 Hale P. C., 533.

¹¹ 1 Hale P. C., 533, 583.

from the robber had thrown into the bush,¹ or his hat which has fallen from his head,² or his property from his servant³ in his presence, he will be considered as having taken them from his person and deemed guilty of robbery. But the taking must be in the presence of the person robbed,⁴ or at the instant he is driven away by force or intimidation, or at least without an intermediate space of time between the forcing away and the taking, or it is no taking from the person and therefore no robbery;⁵ though if the taking is commenced in the presence of the owner it may be completed in his absence.⁶

10. TRESPASS.

§ 551. Upon Coal Mines, Manufactories, etc. — “Whoever without authority of law, and not being the owner or agent of adjoining lands, enters the coal bank, mine, shaft, manufactory or place where workmen are employed, of another, without the express or implied consent of the owner or manager thereof, after notice that such entry is forbidden, shall be fined not exceeding two hundred dollars, or confined in the county jail not exceeding six months, in the discretion of the court.”⁷

STATEMENT OF THE OFFENSE OF ENTERING A COAL BANK WITHOUT CONSENT OF OWNER.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, without authority of law and not then and there being the owner or agent of adjoining lands, did enter a certain coal-bank, then and there owned by the said A. B., and then and there being a place where workmen of the said A. B. were then and there employed, without then and there having either the express or implied consent of the said A. B., contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

¹ 3 Inst., 39; 4 Black. Com., 243; 3 Chitty Cr. L., 802; U. S. v. Jones, 3 Wash. C. C., 209; Rex v. Fallows, 5 Car. & P., 508; State v. McDowell, 1 Hawks, 449.

² 3 Chitty Cr. L., 802; 3 Inst., 39; 1 Hale P. C., 583.

³ 3 Inst., 39; 1 Hawks P. C. C., 34, § 6; 3 Chitty Cr. L., 502; U. S. v. Jones, 3 Wash. C. C., 209; Rex v. Fallows, 5 Car. & P., 501.

⁴ Rex v. Francis, 2 Str., 1015; 2 Com. R., 478; Com. v. Snelling, 4 Bin., 379; Rex v. Gray, 2 East P. C., 708; Rex v. Hamilton, 8 Car. & P., 49.

⁵ Id.; 2 Greenl. Ev., § 228, n. 3.

⁶ 3 Greenl. Ev., § 228, Merriman v. The Hundred, 2 East P. C., 709; Russ. on C., 876.

⁷ R. S., 392, § 268.

§ 552. **Cutting Trees, etc.** — Whoever shall, knowingly and willfully, without color of title made in good faith, cut, box, fell, bore or destroy any tree or sapling, standing or growing upon the land of another, without the consent of the owner of the land—or, if the land belongs to the state, is school land, canal land, or belongs to any association or corporation, without the consent of the proper authorities or persons having legal charge thereof,—shall be fined not less than three nor more than two hundred dollars, or confined in the county jail not exceeding three months.¹

STATEMENT OF THE OFFENSE OF CUTTING A TREE ON THE LAND OF ANOTHER.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, unlawfully, knowingly and willfully did cut and destroy a certain tree, then and there standing and growing upon the land of another, *to wit.*, of the said A. B.,² without then and there having any color of title to the said tree or land, nor to either of them, made in good faith or otherwise, and also without then and there having the consent of the said A. B., then and there being the owner of the said tree and land, to cut the said tree, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

¹ R. S., 392, § 269; as to the construction of the statute of Iowa, *State v. Gigher*, 23 Iowa, 318.

² The name of the owner of the land on which the alleged trespass was committed must be stated. *State v. McConkey*, 20 Iowa, 574.

SECTION V.

FORGERY, COUNTERFEITING AND KINDRED OFFENSES.

- § 553. Forgery of Records, Writings, etc.
- 554. Of Public Securities, Bank Bills, etc.
- 555. Fictitious Bills, Notes, etc.
- 556. Connecting Parts of Several Bills.
- 557. Proof by Experts.
- 558. Proof of Corporation.
- 559. Evidence—The Instrument must be Produced or its Absence Accounted for—Notice to Produce.
- 560. Evidence that the Instrument was Forged, etc.—Comparison of Signatures—Experts.
- 561. Proof of Forgery, where there are Two Persons or No Person of the Same as that Forged;
- 562. Forgery by Signing One's Own Name An Assumed Name, the Name of a Fictitious Person or Corporation, or the Name of a Deceased Person—Proof of the Existence or Incorporation, when Necessary.
- 563. Cases held to be or not to be Forgeries.
- 564. Evidence of the Intent to Defraud.
- 565. What Sufficient Evidence of the Alleged Intent.
- 566. Proof of other Forgeries to Show Intent—Execution of Instrument by an Assumed Name.
- 567. Intent to use Instrument as Good, Evidence of Intent to Defraud
- 568. Evidence Required of Passing, etc., a Forged, etc., Instrument
- 569. Evidence of Guilty Knowledge.
- 570. Evidence of Place.
- 571. Continued.
- 572. Attempting to Utter, etc., Counterfeit Money—Uttering, etc.
- 573. Counterfeiting Coins.
- 574. Jurisdiction of State Courts in Cases of Counterfeiting.
- 575. Evidence—Production of the Coin.
- 576. Of Counterfeiting.
- 577. Judicial Notice Taken of the Existence of Coins—Variance.
- 578. Evidence of Resemblance to Genuine Coin—Intent to Defraud.
- 579. Passing other Coins—Proof of Guilty Knowledge—Intent.
- 580. Having Possession of Counterfeit Coin, etc., with Intent to Pass it.
- 581. Evidence Required of Having, etc.
- 582. Making or Knowingly Having in Possession Counterfeit Tools.
- 583. Evidence—Guilty Knowledge.
- 584. Forging and Counterfeiting Seals and Signatures of Officers.

1. FORGERY.

§ 553. **Of Records, Writings, etc.** — “Every person who shall falsely make, alter, forge or counterfeit any record or other authentic matter of a public nature, or any charter, letters-patent, deed, lease, indenture, writing obligatory, will, testament, codicil, annuity, bond, covenant, post note, check, draft, bill of exchange, contract, promissory note, due bill for the payment of money or property, receipt for money or property, power of attorney, any auditor’s warrant for the payment of money at the treasury, county order, or any accountable receipt, or any order or warrant or request for the payment of money or the delivery of goods or chattels of any kind, or for the delivery of any instrument of writing or acquittance, release or receipt for money or goods, or any acquittance, release or discharge for any debt, account, action, suit, demand or other thing, real or personal, or any transfer or assurance of money, stock, goods, chattels or other property whatever, or any letter of attorney or other power to receive money, or to receive or transfer stock or annuities, or to let, lease, dispose of a lien, or convey any goods or chattels, lands or tenements, or other estate, real or personal, or any acceptance or indorsement of any bill of exchange, promissory note, draft or order, or assignment of any bond, writing obligatory, or promissory note for money or other property, or any ticket or pass for the passage of any person upon any railroad or other conveyance, or for the admission of any person to any entertainment for which a consideration is required, or any other written instrument of another, or purporting to be such, by which any pecuniary demand or obligation, or any right in any property, is or purports to be created, increased, conveyed, transferred, diminished or destroyed; or shall counterfeit or forge the seal or handwriting of another, with intent to damage or defraud any person, body politic or corporate, whether the said person, body politic or corporate, reside in or belong to this state or not; or shall utter, publish, pass or attempt to pass as true and genuine, or cause to be uttered, published, passed or attempted to be passed as true and

genuine, any of the above-named false, altered, forged or counterfeited matters, as above specified and described, knowing the same to be false, altered, forged or counterfeited with intent to prejudice, damage or defraud any person, body politic or corporate, whether the said person, body corporate or politic reside in this state or not,—every person so offending shall be deemed guilty of forgery, and shall be imprisoned in the penitentiary not less than one year nor more than fourteen years.”¹

§ 554. **Of Public Securities, Bank Bills, etc.** — “Whoever, with intent to defraud, falsely makes, alters, forges or counterfeits any public security, issued in any form, or purporting to be by authority of the United States, or of any state or territory thereof, or any endorsement or writing purporting to be a transfer thereof, or any bank bill or promissory note, issued or purporting to be issued by any bank or banking company in this state, or within the United States, or any of the territories thereof, or any foreign province, state or government; and whoever has in his possession, or receives from another, with intent to utter or pass, or utters or passes, or tenders in payment, as true, any such false, altered, forged or counterfeited bill or note, with intent to injure or defraud any person, shall be imprisoned in the penitentiary not less than one nor more than twenty years.”²

§ 555. **Fictitious Bills, Notes, etc.** — “Whoever shall make, pass, utter or publish, with an intention to defraud any other person, or with like intention shall attempt to pass, utter or publish, or shall have in his possession with intent to pass, utter or publish, any fictitious bill, note or check, purporting to be the bill, note, or check, or other instrument of writing for the payment of money or property of some bank, corporation, copartnership or individual, when in fact, there shall be no such bank, corporation, copartnership or individual in existence, the said person, knowing the said bill, note, check or instrument of writing for the payment of money or pro-

¹ R. S., 367, § 105.

² Id., § 106.

perty to be fictitious, shall be imprisoned in the penitentiary, not less than one nor more than twenty years."¹

§ 556. **Connecting Parts of Several Bills.** — "Whoever fraudulently connects together different parts of several bank notes or other genuine instruments, in such a manner as to produce one additional note or instrument, with intent to pass all of them as genuine, shall be deemed guilty of forgery in like manner as if each of them had been falsely made or forged, and punished accordingly."²

§ 557. **Proof by Experts.** — "Persons of skill shall be competent to testify as to the genuineness of any bill, note or other instrument alleged to be forged or counterfeited."³

§ 558. **Proof of Corporation.** — "On the trial of any person for forging any bill or note, purporting to be the bill or note of some incorporated company or bank, or for passing or attempting to pass, or having in possession with intent to pass, any such forged bill or note, it shall not be necessary to prove the incorporation of such bank or company by the charter or act of incorporation, but the same may be proved by general reputation."⁴

STATEMENT OF THE OFFENSE OF FORGERY.⁵

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, feloniously,⁶ fraudulently⁷ and falsely⁸ did make (or "utter"), forge

¹ R. S., 368, § 107.

² Id., § 108.

³ Id., § 109.

⁴ R. S., 368, § 110; *Snow v. State*, 14 Wis., 479.

⁵ For forms of indictments, see *Crofts v. People*, 2 Scam., 443; *Cross v. People*, 47 Ills., 154.

⁶ Forgery is now a felony. R. S., 394., § 277, and therefore, it will be safer, if not necessary, to insert the word "feloniously." Under a former statute it was held that the words "infamously, criminally and feloniously" were unnecessary. *Quigley v. People*, 2 Scam., 301; *Miller v. People*, 2 Scam., 233.

⁷ The words "unlawfully and fraudulently" are unnecessary. 3 Chitty Cr. L., 1042.

⁸ The word "falsely" is implied in either the words "forge" or "counterfeit." 2 Arch. C. P. & Pl., 798; *Rex v. Atkinson*, 7 Car. & P., 669; *State v. Dark*, 8 Blackf., 526.

⁹ It is sufficient to set out the instrument as it is after being altered. *State v. Weaver*, 13 Ired., 491; *State v. Flye*, 26 Me., 312.

and counterfeit a certain promissory¹ note,² purporting³ to have been made and executed⁴ by the said A. B.,⁵ for the payment of money⁶ to the said C. D., which said false ("altered") forged and counterfeited promissory note is in the words⁷ and figures following, *to wit.* (*insert an exact⁸ copy of the*

¹ If the contract is called by the wrong name, but correctly recited, the indictment will be good. *Bland v. People*, 3 Scam., 366; *contra*, 3 Chitty Cr. L., 1041; 3 Greenl. Ev., § 108; *Reg. v. Williams*, 2 Car. & K., 51; *State v. Handy*, 20 Me., 81.

² "I promist," instead of "I promise," does not prevent the instrument from being a promissory note. *Bland v. People*, 3 Scam., 364; *Com. v. Stow*, 1 Mass., 54; *Com. v. Parmenter*, 5 Pick., 273.

³ The word "purporting" is necessary. If it is alleged that the instrument was signed or executed by the person whose name is alleged to have been forged, the allegation is repugnant and bad; because if the instrument was signed by such a person it was not signed by the defendant. 2 Bish. Cr. P., § 417; *Rex v. Carter*, 2 East P. C., 985; *Snow v. State*, 14 Wis., 479. If the instrument purports to have been made and executed by a corporation it must be alleged that it purported to be one of a corporation duly authorized to issue it. *Snow v. State*, 14 Wis., 479.

⁴ It is not necessary to allege that the instrument was stamped. *Cross v. People*, 47 Ills., 152.

⁵ A variance between the alleged name of the maker of the instrument and the name proved is fatal. *State v. Waters*, 3 Const., 669; but see *State v. Nichols*, 38 Iowa, 110.

⁶ These words may be omitted in a case of a forgery of bank bills. *Townsend v. People*, 3 Scam., 323; though it may be otherwise as to due bills and promissory notes. *Id.*

⁷ An indictment must profess to set out the forged instrument according to its tenor, that is by a precise recital. It is not sufficient to set out its substance. 2 Bish. Cr. P., § 403; *contra*, *Bostick v. State*, 34 Ala., 266. The words "to the tenor following," "according to the tenor following," "in these words," "as follows," *Rex v. Philipps*, 6 East, 464; "in these words and figures following," 1 Chitty Cr. L., 233; *Rex v. Beare*, 1 Ld. Raym. 414; *Dana v. State*, 2 Ohio S., 91, "as follows, that is to say," have respectively been held sufficient to allege the tenor.

⁸ The instrument charged to be forged should be set forth in the exact words and figures if in the possession of the prosecution; 2 Arch. C. P. & Pl., 801; *Cross v. People*, 47 Ills., 152; *Brown v. People*, 66 Ills., 344; *State v. Jones*, 1 M. & M., 236; *State v. Callendine*, 8 Iowa, 289; *State v. Nichols*, 38 Iowa, 110; *Com. v. Houghton*, 8 Mass., 107; *Rex v. Haworth*, 1 C. R. & P., 254; *contra*, *State v. Hill*, 30 Wis., 419; *State v. Thompson*, 19 Iowa, 299; or the omission must be excused by the proper averments. *People v. Badgley*, 16 Wen., 53; *Croxdale v. State*, 1 Head, 139; *Hooper v. State*, 8 Humph., 93; *U. S. v. Britton* 2 Mason C. C., 464; *State v. Potts*, 4 Halst., 26; *contra*, *State v. Carr*, 5 N. H., 367. And if the instrument is lost, the substance and

note) with intent thereby, then and there to prejudice, damage and defraud the said A. B.,¹ contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF PASSING A FORGED RECEIPT.²

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, feloniously and fraudulently did utter, publish and pass (*or "attempt to pass" or "cause to be uttered, published and passed"*) to the said A. B.,³ as true and genuine, a certain false, forged and counterfeit receipt for money purporting to have been signed by E. F., then and there well knowing the same to be false, forged and counterfeited, with intent thereby, then and there to prejudice, damage and defraud the said A. B., which said false, forged and counterfeit receipt is as follows: (*insert exact copy of receipt*) contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF PASSING A FICTITIOUS BILL.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, feloniously and fraudulently did pass, utter and publish to the said A. B., with intent thereby then and there to defraud the said A. B., a certain fictitious bill, for the payment of money purporting to have been

effect should be set forth so that the court may see that the instrument was such as it would be a crime to forge. *Wallace v. People*, 27 Ills., 45. But the letters and marks in the margin which form no part of the instrument may be omitted. *Com. v. Bailey*, 1 Mass., 62; *Com. v. Stevens*, 1 Mass., 203; *State v. Franklin*, 3 John. C., 299; *Quigley v. People*, 2 Scam., 301; *Cross v. People*, 47 Ills., 153; *State v. Flye*, 26 Me., 312. So where the forgery represents the maker of the instrument as having signed it with his mark, the copy of the instrument in the indictment need not contain the mark. *Reg. v. Smith*, 1 Salk. 342. If there is a variance in the spelling, that is not material, provided the same sound is preserved. *State v. Bean*, 19 Vt., 530; *Rex v. Crooke*, 2 East P. C., 921. But where a counterfeit bank note was described in the indictment as payable to E. Lymour, and the note produced in evidence was payable to E. Seymour, the variance was held fatal. *Porter v. State*, 15 Ind., 433. As the indorsement forms no part of the note, it need not be set forth though it be forged. *Hess v. State*, 5 Ohio, 5; *Com. v. Ward*, 2 Mass., 397; *Buckland v. Com.*, 8 Leigh, 732.

¹ It is proper to join a count for forging a paper with another count for uttering the same paper in an indictment. *State v. Nichols*, 38 Iowa, 120.

² For form in case of passing a counterfeit bank note, see *Swan v. People*, 4 Scam., 178.

³ The name of the person to whom the instrument was passed must be stated with certainty when known, and if not known, the fact should be alleged. *Buckley v. State*, 2 Greene Iowa, 162.

issued by a certain bank called (*insert name of the bank*) when in truth and in fact, there was not then nor had there been at any other time any such bank in existence, the said C. D. then and there well knowing the said bill to be fictitious, which said fictitious bill is in the words and figures following (*insert exact copy of the bill*) contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 549. Evidence — The Instrument must be Produced or its Absence Accounted for — Notice to Produce. — Before evidence can be given that the instrument is forged or counterfeit, it must be produced if in existence and accessible.¹ But its absence may be accounted for by showing that it is lost² or has been destroyed by the prisoner,³ or otherwise destroyed without the fault of the prosecutor,⁴ or has been secreted to protect the offender,⁵ or is in the possession of the prisoner,⁶ and if shown to be in his possession previous to the trial, the presumption is, that it is in his possession at the time of the trial.⁷ Yet before secondary evidence can be given of the contents of forged paper in the prisoner's possession, due notice must be given to him to produce it, unless it clearly appears that the prisoner has destroyed it,⁸ though the admission of the prisoner that he committed the crime may be received without producing the forged instrument or accounting for its absence.⁹

§ 560. Evidence that the Instrument was Forged, etc. — Comparison of Signatures — Experts. — In proof that the instrument was forged, counterfeited or altered, evidence may be received

¹ Com. v. Hutchinson, 1 Mass., 7; State v. Blodgett, 1 Root, 534; State v. Osborn, 1 Root, 152; U. S. v. Button, 2 Mason, 464.

² Com. v. Snell, 3 Mass., 82; People v. Kingsley, 2 Cowen, 522, 525.

³ State v. Ford, 2 Root, 93; State v. Potts, 4 Halst., 26.

⁴ 3 Greenl. Ev., § 107.

⁵ Rex v. Hunter, 3 Car. & P., 59; Com. v. Snell, 3 Mass., 82; Pendleton v. Com., 4 Leigh, 694; Com. v. Hutchinson, 1 Mass., 7; U. S. v. Doeblér, 1 Baldw., 519.

⁶ Rex v. Hunter, 3 Car. & P., 59; Rex v. Haworth, 4 Car. & P., 128.

⁷ People v. Kingsley, 2 Cowen, 522.

⁸ 3 Greenl. Ev., § 107; Rex v. Haworth, 2 Root, 93; State v. Potts, 4 Halst., 26; U. S. v. Button, 2 Mason, 468; Rex v. Spragg, 14 East, 276; Doe. v. Morris, 3 Ad. & El., 46; *contra*, U. S., v. Doeblér, Baldwin, 519, 522.

⁹ State v. Ford, 2 Root, 93.

of witnesses who have seen the person whose name is alleged to have been forged, write,¹ but it must be before the difficulty arose,² or in the ordinary course of business, when he had no motive to disguise his hand,³ or who have become acquainted with his handwriting⁴ by corresponding with him,⁵ by seeing notes, letters, etc., with his signature to them received at the bank of which he was teller as genuine,⁶ by seeing notes purporting to be signed by the party and afterwards paid or acknowledged by him,⁷ or by seeing other papers signed by him known to be genuine,⁸ though they may not have seen such person write.⁹ But a witness who has no other knowledge of a party's handwriting than from having seen writings said by other persons to be his, cannot be allowed to testify,¹⁰ though a bank bill may be proved to be counterfeit by a person of skill, who knows the signature of the president and cashier of the bank from having seen the bills of such bank in circulation without having seen them write;¹¹ and such may be allowed to state that from their knowledge of the paper, type and the whole appearance of the bill they believe it to be counterfeit.¹² Yet the opinion of a witness who has no previous knowledge of the party's handwriting, founded solely by comparing genuine documents not in evidence¹³ with

¹ 1 Greenl. Ev., § 577; *Pate v. People*, 3 Gilm., 660; *Woodford v. McClenahan*, 4 Gilm., 89.

² *Pate v. People*, 3 Gilm., 644.

³ 2 Phil. Ev., 597; *Stranger v. Searle*, 1 Esp., 14, 5 Ad. & El., 703.

⁴ *R. v. Hughes*, 2 East P. C., 1002.

⁵ 2 Phil. Ev., 599; *Titford v. Knott*, 2 John., 211; *Woodford v. McGlenahan*, 4 Gilm., 39; *Com. v. Smith*, 6 Serg. & R., 568.

⁶ *Simmons v. State*, 7 Ham. R., 116; *Com. v. Carey*, 2 Pick., 47.

⁷ *Johnson v. Daverne*, 19 John., 134; *Titford v. Knott*, 2 John. C., 213.

⁸ 2 Phil. Ev., 600; *State v. Carr*, 5 N. H., 367; *Woodford v. McClenahan*, 4 Gilm., 89; *Putnam v. Wadley*, 40 Ills., 346.

⁹ 2 Arch. C. P. & Pl., 814-817; 1 Greenl. Ev., 577.

¹⁰ *Goldsmith v. Bane*, 3 Halst., 87; *Thatcher v. Goff*, 11 Lou. An., 94; *Cunningham v. Hudson*, River Bank, 21 Wen., 557.

¹¹ *State v. Carr*, 5 N. H., 367; *Com. v. Smith*, 6 Serg. & R., 568; *May v. State*, 14 Ohio, 461; *State v. Harris*, 5 Ired., 288; *State v. Chandler*, 3 Hawks, 393; *Watson v. Cresap*, 1 B. Monr., 195; *State v. Spence*, 2 Harring., 348.

¹² *Com. v. Smith*, 6 Serg. & R., 568.

¹³ *Pate v. People*, 3 Gilm., 660.

the prisoner's signature to them with the one in dispute as to whether or no they were written by the same individual, is inadmissible,¹ even though he is an acknowledged expert.² Nor can a document undoubtedly written by the prisoner, but unconnected with the charge, be put in evidence that the jury may compare the writing and signature to it with the one alleged to have been forged.³ But if a written instrument known to be genuine is material to the issue and is put in evidence because material, or is properly in evidence,⁴ the jury may institute such comparison to determine whether the signature in controversy is a forgery or not,⁵ for the reason that such writing is free from all suspicion from undue selection.⁶ Persons skilled in the examination of handwriting and in detecting forgeries, such as brokers,⁷ tellers⁸ and cashiers⁹ of banks and the like¹⁰ are competent witnesses to prove the forgery,¹¹ and may give to the jury their opinions as to erasures and alterations.¹² The person whose name has been forged is a competent witness to prove the forgery,¹³ but he

¹ *Putnam v. Wadley*, 40 Ills., 346; *People v. Spooner*, 1 Denio, 343; *Rowt v. Kyle*, 1 Leigh R., 216; *Van Wyck v. McIntosh*, 14 N. Y., 439.

² *People v. Spooner*, 1 Denio, 343; *Lodge v. Phipher*, 11 Serg. & R., 336; *Rex v. Cator*, 4 Esp., 117; but see *R. S.*, 368. 109; *Com. v. Williams*, 105 Mass., 63.

³ 2 Phil. Ev., 611; 1 Greenl. Ev., §§ 580, 581; *Jackson v. Phillips*, 9 Cowen, 94, 112; *Titford v. Knott*, 2 John. C., 210; *State v. Allen*, 1 Hawks, 6; *Pope v. Askew*, 1 Ired., 16; *Kinney v. Flynn*, 2 R. I., 319; *contra*, *Moody v. Rowell*, 17 Pick., 490; *Richardson v. Newcomb*, 21 Pick., 315; *Hammond's Case*, 2 Greenl., 33; *Lyon v. Lyman*, 9 Conn., 55; *Jumpretz v. People*, 21 Ills., 356; *v. Woolfolk*, 1 Iowa, 137.

⁴ 2 Phil. Ev., 611, 615; *Pate v. People*, 3 Glim., 659.

⁵ 1 Greenl. Ev., § 558; *Brobston v. Cahill*, 64 Ills., 356; *Com. v. Coe*, 115 Mass., 482; *Com. v. Tenney*, 97 Mass., 50; *Com. v. Mason*, 105 Mass., 163.

⁶ 2 Phil. Ev., 611, 616.

⁷ *Lyon v. Lyman*, 9 Conn., 55; *Martin v. Com.*, 2 Leigh, 745.

⁸ *Hess v. State*, 5 Ham., 5, 7.

⁹ *Johnson v. People*, 4 Denio, 368; *Lyon v. Lyman*, 9 Conn., 55.

¹⁰ *State v. Chandler*, 3 Hawks, 393; *State v. Harris*, 5 Ired., 287.

¹¹ *R. S.*, 368. § 109.

¹² *Pate v. People*, 3 Glim., 659.

¹³ *Noble v. People*, Breese, 29, 2d Ed., 54; *Com. v. Snell*, 3 Mass., 82; *People v. Dean*, 6 Cowen, 27; *Com. v. Peck*, 1 Met., 129.

is not an indispensable witness,¹ though as good as any, but no better.²

§ 561. **Proof of a Forgery where there are Two Persons, or is No Person, of the Same Name as that Forged.** — Evidence that the signature is not in the handwriting of the person represented by the prisoner to the maker, though it appear that there is another person by the same name,³ or that there is no such person represented, is sufficient evidence of forgery.⁴ Persons who are acquainted with the place and its inhabitants where the prisoner represented that the supposed party to the forged instrument resided, are usually called to show the non-existence of such person;⁵ but if inquiries have been made there by a stranger his testimony as to the fact and the result of his inquiries is admissible.⁶

§ 562. **Forgery by Signing One's Own Name, an Assumed Name, the Name of a Fictitious Person or Corporation, or the Name of a Deceased Person—Proof of Existence or Incorporation of a Corporation, when Necessary.** — Forgery may be committed by signing one's own name with intent to pass it off as the signature of another of the same name.⁷ As if a person not the payee of a bill of exchange, but having the same name, endorse and transfer it, knowing that he is not the person intended as the payee, it is forgery.⁸ If a man makes a false instrument in his own name, it is forgery.⁹ As if a person, having conveyed land by deed, afterwards conveys the same land to another by a second deed, which he falsifies by dating it prior to the first deed, and then procures it to be filed for record be-

¹ *State v. Carr*, 5 N. H., 367; *Foulker's Case*, 2 Robinson, 836.

² 3 Greenl. Ev., § 106; *Rex v. Hughes*, 2 East P. C., 1072; *Foulker's Case*, 2 Robinson, 836.

³ 3 Greenl. Ev., § 109; 2 Arch. C. P. & Pl., 829.

⁴ 3 Greenl. Ev., § 109.

⁵ *Rex v. Backler*, 5 Car. & P., 119.

⁶ *Rex v. King*, 5 Car. & P., 123.

⁷ *Barfield v. State*, 29 Ga., 127.

⁸ *Mead v. Young*, 4 T. R., 28; *Reg. v. Rogers*, 8 Car. & P., 629; *People v. Peacock*, 6 Cowen, 72; *Graves v. American Exchange Bank*, 17 N. Y., 205; *Rex v. Parkes*, 2 Leach C. C., 775.

⁹ 2 Arch. C. P. & Pl., 837; 2 Inst., 169.

fore the first deed is filed, he is guilty of forgery.¹ So forgery may be committed by signing an instrument by an assumed name with intent thereby to defraud,² or by using the name of a non-existing and fictitious person³ or corporation,⁴ or of a person who is dead.⁵ No proof of the existence or incorporation of the corporation purporting to have issued the forged instrument is required unless described as duly incorporated or an intent to defraud that corporation is alleged.⁶

§ 563. **Cases Collected Held to be or Not to be Forgeries.**—It is not forgery for a person to use the name of another if he really has authority to do so, for it is the same as if the other had written it;⁷ or even if it be done under circumstances that the writer may fairly and *bona fide* think that he has the authority of the other party.⁸ Nor is it forgery for a man to sign his own name per procuration of the party whom he pretends to represent, for it is no false making of the instrument, but merely a false assumption of authority.⁹ It has been held that it is not forgery to write a promissory note for a large amount and read it to an ignorant person as a note for a much less amount and thereby induce him to sign it as maker.¹⁰ A writing

¹ 3 Inst., 169; 1 Hawks P. C. C., 70, § 2; 2 Arch. C. P. & Pl., 837; Reg. v. Ritson Law R., 1 C. C., 200; but see 2 Bish. Cr. L., §§ 584, 585; *post* § 609.

² Rex v. Parks, 2 Leach, 775; 2 East P. C., 963; Rex v. Marshall, Russ. & Ry., 75; Rex v. Whiley, Russ. & Ry., 90; Rex v. Taft, 1 Leach, 172.

³ R. S., 368, § 107; 3 Greenl. Ev., 103; 2 Arch. C. P. & Pl., 822; 1 Bish. Cr. L., § 572; Rex v. Shepherd, 2 East P. C., 967; State v. Givens, 5 Ala., 747.

⁴ People v. Davis, 21 Wen., 313; People v. Stearns, 21 Wen., 418; Com. v. Smith, 6 Serg. & R., 570; State v. Van Hart, 2 Harrison, 327.

⁵ Henderson v. State, 14 Texas, 503.

⁶ State v. Pierce, 8 Iowa, 231; People v. Peabody, 25 Wen., 483; Quigley v. People, 2 Scam., 303; State v. Givens, 5 Ala., 747; De Bow v. People, 1 Denio, 9; Com. v. Carey, 2 Pick., 47; State v. Newland, 7 Iowa, 242; Com. v. Smith, 6 Serg. & R., 568; People v. Stearns, 21 Wen., 423; People v. Davis, 21 Wen., 309; *contra*, State v. Morton, 8 Wis., 352; see *post* § 564.

⁷ 2 Arch. C. P. & Pl., 819.

⁸ Rex v. Parish, 8 Car. & P., 94; Rex v. Forbes, 7 Car. & P., 224; Reg. v. Beard, 8 Car. & P., 143; Reg. v. Clifford, 2 Car. & K., 202; Reg. v. Rogers, 8 Car. & P., 629.

⁹ Reg. v. White, 2 Car. & K., 404, 1 Den., 208; Rex v. Maddocks, 2 Russ. on C., 499; Rex v. Arscott, 6 Car. & P., 408.

¹⁰ Com. v. Sankey, 22 Penn., 390.

void on its face is not the subject of forgery without some extrinsic circumstances showing how it may become pernicious.¹ An instrument, to be the subject of forgery, must be such as is legally capable of effecting a fraud.² An offender is indictable for any common-law forgery which has not been specially provided for in any statute.³ So forgery may be committed by filling up a blank check for the payment of money, or bill of exchange to which a signature is attached for a larger amount than the person who received it was authorized to do.⁴ And it is forgery for a man who is ordered to draw a will for a sick person, to insert a legacy in it without being directed to do so.⁵ So if a man find another's name written on a blank piece of paper, or at the bottom of a letter at a considerable distance from the bottom, and cuts it off and writes another instrument over the signature,⁶ or alters a receipt already written and signed,⁷ it is a forgery. The detachment from a written instrument of a condition thereto, written upon the same paper and at the same time, whereby the writing is changed from a non-negotiable instrument to a negotiable promissory note, is forgery and punishable as such.⁸

§ 564. The Intent to Defraud some Person or Corporation must be

¹ 2 Arch. C. P. & Pl., 808; *People v. Shall*, 9 Cowen, 778; *People v. Harrison*, 8 Barb., 560; *Com. v. Ray*, 3 Gray, 441; *People v. Stearns*, 21 Wen., 414; *John v. State*, 23 Wis., 504.

² 2 Bish. Cr. L., § 533; *People v. Galloway*, 17 Wen., 540; *Rex v. Moffatt*, 2 Leach, 483; *People v. Cady*, 6 Hill, 490; *Waterman v. People*, 67 Ills., 91; *contra*, *State v. Thompson*, 19 Iowa, 303.

³ 2 Bish. Cr. L., 557; *Com. v. Ray*, 3 Gray, 441, 448; *Com. v. Ayer*, 3 Cush., 150.

⁴ *Rex v. Wilson*, 2 Car. & K., 527; *Reg. v. Bateman*, 1 Cox C. C., 186; *Reg. v. Heart*, 1 Moody, 486; 7 Car. & P., 652; *Rex v. Atkinson*, 7 Car. & P., 669; *Van Duzer v. Howe*, 21 N. Y., 531; *State v. Flanders*, 38 N. H., 324.

⁵ 3 Inst., 171; *Combe's Case*, Noy, 101, Sir F. Moore, 759; *Marvin's Case*, 3 Dy., 288; Pl., 52.

⁶ 3 Inst., 171; 2 Arch. C. P. & Pl., 839.

⁷ *State v. Woodard*, 20 Iowa, 541.

⁸ *State v. Stratton*, 27 Iowa, 420.

Proved,¹ though it is not necessary to show that any person was actually defrauded.² It has been held in other states under statutes similar to ours, that there need not be any intent to defraud any particular person, and that a general intent to defraud some person or corporation was sufficient.³ And it may frequently happen that the offender, though he intended to defraud such person as he could at the time he forged the instrument, may not know who such person would be or who he intended to defraud, yet the offense be complete.⁴ But it has been held, and may possibly be so, that if an intent to defraud a particular person is alleged, the allegation is material and must be proved.⁵ And in another case it was held that it was necessary to prove an intent to defraud a particular person though not alleged.⁶ And in another case still, it was held that an intent to defraud some one, naming him, must be averred and proved as laid,⁷ which seems to us to be the true rule, provided the person intended to be defrauded is known, and if not known, it should be so alleged.⁸ Where an intent to defraud a bank, giving its name, was alleged without alleging that it was a corporation duly created, it was held that the incorporation of the bank might be proved.⁹ It must be shown that the person or corporation intended to be defrauded was a real person, or a duly incorporated body politic or corporate,

¹ 2 Arch. C. P. & Pl., 842; *Read v. State*, 15 Ohio, 217; *State v. Woodard*, 20 Iowa, 541.

² *Com. v. Ladd*, 15 Mass., 526; *State v. Pierce*, 8 Iowa, 231; *State v. Washington*, 1 Bay, 120; *Rex v. Ward*, 2 Ld. Raym., 1461.

³ *Arnold v. Cost*, 3 G. & J., 219; *Bevington v. State*, 2 Ohio, N. S., 160; *State v. Morton*, 18 Wis., 352.

⁴ *Barb. Cr. L.*, 116; *Roscoe Cr. Ev.*, 505.

⁵ 2 *Bish. Cr. L.*, § 543; *Com. v. Whitney*, *Thatcher C. C.*, 588; *Rex v. Hodgson*, 36 *Engl. Law & Eq.*, 626; *State v. Odell*, 3 *Brev.*, 552; *West v. State*, 2 *Zab.*, 212.

⁶ *Rex v. Hodgson*, 36 *Eng. L. & Eq.*, 624.

⁷ *Reed v. State*, 15 Ohio, 717.

⁸ 2 *Bish. Cr. L.*, § 543; *Willis v. People*, 1 *Scam.*, 399; *contra*, *Wilkinson v. State*, 10 *Ind.*, 372; *State v. Barrett*, 8 Iowa, 536.

⁹ *People v. Stearns*, 21 *Wen.*, 409; *Com. v. Smith*, 6 *Serg. & R.*, 570.

capable of being defrauded, for nonentities cannot be defrauded.¹ Though it is not necessary to prove the incorporation of the bank or company by which the forged instrument purports to have been issued or is alleged to have been defrauded, by the charter, or act of incorporation, for by statute the same may be proved by general reputation.² And independent of the statute, proof of the existence of the corporation of the most general character,³ even by parol, is sufficient.⁴ As we have seen,⁵ proof of the incorporation of the bank or company by which the forged instrument purports to have been issued is required only when such bank or company is alleged to be incorporated.⁶

§ 565. **What Sufficient Evidence of the Alleged Intent.** — It is sufficient to prove an intent to defraud the person alleged to have been intended to be defrauded, though it appears by the evidence that others were intended to be defrauded jointly with him.⁷ In order to find the intent to defraud a certain person, it is not necessary that there should be evidence to show that the prisoner had the particular person in contemplation at the time of the forgery.⁸ And the very act of forgery will be sufficient of itself to imply an intent to defraud;⁹ for

¹ 2 Bish. Cr. L., § 543; *People v. Peabody*, 25 Wen., 474; *State v. Givens*, 5 Ala., 748; *Com. v. Carey*, 2 Pick., 47; *De Bow v. People*, 1 Denio, 9; *State v. Dourden*, 2 Dev., 443; *Com. v. Smith*, 6 Serg. & R., 570.

² R. S., 368, § 110; *Snow v. State*, 14 Wis., 479.

³ *People v. Davis*, 21 Wen., 309; *State v. Morton*, 8 Wis., 352; *Snow v. State*, 14 Wis., 479; *State v. Cole*, 19 Wis., 129.

⁴ *Dennis v. People*, 1 Park. Cr. R., 469; *People v. Chadwick*, 2 Park. Cr. R., 163; *State v. Calvin*, R. M. Charl., 151; *State v. Smith*, 5 Day, 175; *Reed v. State*, 15 Ohio, 217, 224.

⁵ *Ante* § 562.

⁶ *State v. Morton*, 8 Wis., 352; *State v. Newland*, 7 Iowa, 242; *State v. Pierce*, 8 Iowa, 231; *State v. Hayden*, 15 N. H., 355; *McCartney v. State*, 3 Ind., 353.

⁷ *Rex v. Powell*, 1 Leach, 77; 2 East P. C., 976; *Rex v. Lovell*, 1 Leach, 282; *People v. Curling*, 1 John., 320; *Veazie's Case*, 7 Greenl., 131; *Stoughton v. State*, 22 Ohio N. S., 562; *Rex v. Hansom*, 1 C. & M. 334.

⁸ *Barb. Cr. L.*, 116; *Rex v. Mazagora*, Russ. & Ry., 291; *Rex v. Shepherd*, Russ. & Ry., 169; *U. S. v. Moses*, 4 Wash. C. C., 726.

⁹ 2 Arch. C. P. & Pl., 843; *State v. Woodard*, 20 Iowa, 553.

the law presumes an intent to defraud the person who would have to pay the instrument if it were genuine,¹ although the object was to defraud whoever might take the instrument, and the intention to defraud the person in particular who would have to pay the instrument did not enter into the prisoner's contemplation.² But on an indictment for passing a note purporting to be a bank note where no such bank exists, it must be averred and proved that it was passed with intent to defraud the person to whom it was passed.³ The person to whom a forged order for goods is directed may be defrauded though such person has no interest in the goods, except the lawful possession of them, which he has a right to retain against all the world except the owner.⁴ The criminal intent which the law infers from forging an instrument and using it as evidence of a claim against a person whose name is forged, cannot be negatived by the proof that the claim was in reality a just one.⁵

§ 566. **Proof of Other Forgeries, etc., to Show Intent — Execution of Instrument by Assumed Name.** — The conduct and behavior of the supposed offender, as that he committed another forgery at the same time as the offense for which he is on trial,⁷ as well as the passing of the forged instrument, is evidence of the guilty intent.⁸ If the instrument was executed under an assumed name the burden of proof is on him to show the want of a guilty intent to defraud, which he may do by proving the assumed name before the time of the execution of the instrument, or by other evidence showing his innocence of an intent to defraud.⁹

¹ *Com. v. Stephenson*, 11 Cush., 481.

² *U. S. v. Shelmore*, 1 Baldw., 371; 3 Chitty Cr. L., 1039.

³ *Hooper v. State*, 8 Humph., 93; 9 Humph., 80.

⁴ *Harris v. People*, 9 Barb., 670; *People v. Stearns*, 21 Wen., 409.

⁵ *Reg. v. Hill*, 2 Moody & Cr., 300; 8 Car. & P., 274; *Reg. v. Beard*, 34 Engl. Cr. L., 329; *Perdue v. State*, 2 Humph., 494; *State v. Woodard*, 20 Iowa, 553.

⁶ *Cross v. People*, 47 Ills., 152; *Com. v. Miller*, 3 Cush., 243; *Hess v. State*, 5 Ohio, 5; *State v. Mix*, 15 Mo., 153.

⁷ *Roscoe Cr. Ev.*, 504; *Rex v. Shepherd*, 1 Leach, 226; *Russ. & Ry.*, 169.

⁸ 3 Chitty Cr. L., 1036; *R. v. Francis*, *Russ. & Ry.*, 209; *R. v. Bontien*, *Russ. & Ry.*, 260; *R. v. Peacock*, *Russ. & Ry.*, 178.

§ 567. Evidence of an Intent that the Instrument Forged shall be used as Good is Conclusive Evidence of an Intent to Defraud, for in such case the law conclusively infers fraud, though in fact there was no actual intent to injure or wrong another;¹ as if a man gets a forged note discounted, intending to pay it at maturity, and does actually take it up so as to prevent injury falling upon any person;² or if he, while knowingly passing a forged note, agrees to take it back again if it should prove not to be genuine,³ or if a creditor executes a forgery of the debtor's name to get from the proceeds payment of a sum due him;⁴ or if a party forges a deposition to be used in court, stating merely what is true to enforce a just claim,⁵ he is guilty of the offense of forgery. A man does not ordinarily commit such offense who alters a bond or other instrument payable to himself by reducing the sum payable under it, unless the circumstances show a benefit to himself or a prejudice to another.⁶

§ 568. Evidence Required of Passing, etc., a Forged, etc., Instrument. — It must be proved : 1. That it was passed, uttered or published;⁷ 2, that it was forged or fictitious;⁸ 3, that the prisoner knew at the time he passed, uttered or published the instrument that it was forged or fictitious;⁹ and, 4, that it was the intent to damage or defraud some person or corporation.¹⁰ The act of passing is not complete until the instrument is received

¹ Reg. v. Hodgson, 36 Eng. L. & Eq., 626; R. v. Cooke, 8 Car. & P., 586; Reg. v. Vaughn, 8 Car. & P., 276.

² Reg. v. Geach, 9 Car. & P., 499; Reg. v. Hill, 8 Car. & P., 582; Reg. v. Beard, 8 Car. & P., 143; Reg. v. Forbes, 7 Car. & P., 224; Reg. v. Berket, Russ. & Ry., 86; State v. Woodard, 20 Iowa, 553.

³ Perdue v. State, 2 Humph., 494; Rex v. Cushlan, Jebb, 113.

⁴ Reg. v. Wilson, 2 Car. & K., 527, 1 Den. C. C., 284.

⁵ State v. Kimball, 50 Me., 409.

⁶ 1 Hawks P. C., 264, § 4; Blake v. Allen, Sir F. Moore, 619.

⁷ 2 Arch. C. P. & Pl., 812.

⁸ Id.

⁹ Id.; 3 Greenl. Ev., § 111; Rex v. Wyle, 1 New R., 92; Reg. v. Oddy, 5 Cox C. C., 210; State v. Morton, 8 Wis., 352; State v. Arthur, 21 Iowa, 325.

¹⁰ Id.; Rex v. Jones, 2 East P. C., 991; U. S. v. Moses, 4 Wash. C. C., 726; Grafton Bank v. Flanders, 4 N. H., 239; People v. Flanders, 18 John., 166.

by the person to whom the instrument is offered.¹ To constitute an uttering within the statute, the instrument forged must be parted with or tendered or offered or used in some way to get money or credit upon,² or by means of it.³ If the instrument is uttered through the means of an innocent agent, as by an ignorant boy, this is proof of uttering by the employer;⁴ and this principle seems equally applicable to the case of uttering by means of a guilty agent.⁵ The uttering is sufficient if the forged instrument is only left in pledge⁶ or offered in dealing, though it be refused,⁷ or is delivered to an agent of the corporation, liable upon the instrument if it had been genuine, employed to detect the forgery, but representing himself as a purchaser of spurious paper.⁸ To publish an instrument, is to assert, directly or indirectly, by words or actions, that it is good.⁹ The presentation of a forged draft or order for money to the person to whom it purports to be directed for payment, although the payment is refused and the draft or order returned to the prisoner, is an uttering and publishing within the meaning of the statute.¹⁰

§ 569. In Proof of Guilty Knowledge evidence is admissible that the prisoner had at the same time uttered or attempted

¹ *Com. v. Searle*, 2 Bin. 339; *U. S. v. Mitchell*, Baldwin, 367; *Rex v. Shukard*, Russ. & Ry. C. C., 200.

² 3 Chitty Cr. L., 1038, 1039.

³ *Reg. v. Ion*, 16 Jur., 746, 1 Lead. C. Cases, 400; 2 Den. C. C., 475; 14 Eng. L. & Eq., 556; *Reg. v. Radford*, 1 Den. C. C., 59.

⁴ *Com. v. Hill*, 11 Mass., 136; *Reg. v. Fitchie*, 1 Dears & Bell, 175.

⁵ *Rex v. Giles*, Ry. & Moody C. C., 166; *Rex v. Palmer*, 1 New R., 96; *U. S. v. Morrow*, 4 Wash., 733.

⁶ *Rex v. Berket*, Russ. & Ry., 86; *Reg. v. Cooke*, 8 Car. & P., 582; *contra*, *Com. v. Searle*, 2 Bin., 232; *U. S. v. Mitchell*, Baldwin, C. C., 367; *Gentry v. States*, 3 Yerg., 451.

⁷ *Rex v. Arscott*, 6 Car. & P., 408; *Rex v. Shukard*, Russ. & Ry. C. C., 200; *Rex v. Palmer*, 2 Leach, 978, 4 Bos. & Pul., 96; *People v. Rathbun*, 21 Wen., 528.

⁸ *Rex v. Holden*, Russ. & R. C. C., 154, 2 Taunt., 334, 2 Leach C. C., 1019.

⁹ *Com. v. Searle*, 2 Bin., 339; *U. S. v. Mitchell*, Baldwin, 367; *Rex v. Shukard*, Russ. & Ry. C. C., 200.

¹⁰ *People v. Brigham*, 2 Mich., 550.

to utter forged instruments of the same description,¹ provided they are produced or their absence accounted for;² or that he had such others, or instruments for manufacturing them, in his possession;³ or that at the time the prisoner was arrested he was engaged with others in coining false money;⁴ or that he pointed out the place where other instruments of the same description were by him concealed;⁵ or that at other utterings of the same sort of paper he assumed a different name;⁶ or that the prisoner endeavored to procure counterfeit money and desired to cultivate the acquaintance of a counterfeiter;⁷ or that at the time he uttered the paper he made false representations or the like;⁸ or that at or near the same time the prisoner uttered or had in his possession forged instruments of a different description,⁸ or previous⁹ or subsequent¹⁰ to the principal charge. If such other utterings are the subject of distinct indictments, the evidence will not on that account be

¹ *Rex v. Wyle*, 1 New R., 92; *Rex v. Ball*, 1 Camp., 324; *U. S. v. Rondenbush*, Baldw., 514; *U. S. v. Doeblor*, Baldw., 519; *Steele v. People*, 45 Ills., 152; *Cross v. People*, 47 Ills., 152; *Martin's Case*, 2 Leigh, 745; *State v. Hereten*, 2 Penn., 672.

² *State v. Cole*, 19 Wis., 129.

³ *Rex v. Hough*, Russ. & Ry., 120; *Com. v. Stone*, 4 Met., 43; *U. S. v. Craig*, 4 Wash. C. C., 729; *Rex v. Balls*, Russ. & M., 470; 7 Car. & P., 426, 429.

⁴ 2 City Hall Rec., 57.

⁵ *Rex v. Rowley*, Russ. & Ry., 110; *Bayley on Bills*, 618.

⁶ *Rex v. Millard*, Russ. & Ry., 245; *Rex v. Ward*, Russ. & Ry., 245.

⁷ *Finn v. Com.*, 5 Rand, 701.

⁸ *Rex v. Shepherd*, Russ. & Ry., 169; 2 East P. C., 697.

⁹ *R. v. Sunderland*, 1 Lewin C. C., 102; *R. v. Kirkwood*, 1 Lewin C. C., 103; *R. v. Martin*, 1 Lewin C. C., 104; *Rex v. Crocker*, 2 New R., 87, 85; *Hess v. State*, 5 Ham., 5; *Com. v. Hendricks*, 5 Leigh, 707; *State v. McAllister*, 24 Me., 139.

¹⁰ *Rex v. Wiley*, 1 Lead. C. Cases, 189; *Reg. v. Nesbett*, 6 Cox C. C., 320; *Rex v. Taverner*, 4 Car. & P., 411, 413, n. a; but see *Rex v. Smith*, 2 Car. & P., 633.

¹¹ *Hoskins v. State*, 11 Ga., 92; *R. v. Foster*, 29 Eng. L. & Eq., 548; *contra*, *R. v. Smith*, 2 Car. & P., 633; *R. v. Smith*, 4 Car. & P., 411; *Com. v. Stearns*, 10 Met., 250; *Rex v. Taverner Case*, 4 Car. & P., 413, n. a.

rejected.¹ But where other instruments, said to be forged, are offered in proof of guilty knowledge, they must be produced or accounted for in the usual way,² and there must be proof that they are forgeries.³ The evidence must be confined to the fact of the prisoner's having uttered such other forged instruments, it being improper to give evidence of what he said or did at any other time, collateral to such other uttering, for the prisoner could not be prepared to meet it.⁴ The prisoner may show that he is a moneyed man to rebut the proof of guilty knowledge, for there is more probability that a vagabond found in the possession of a large sum of money knew it to be bad, than if such sum is found in possession of a moneyed man.⁵ So the defendant may rebut the proof of guilty knowledge by circumstances and acts showing that he supposed the instrument to be genuine, that it was so in fact, or that he examined the "detector" to ascertain whether it was good before passing it.⁶

§ 570. *Evidence of Place.*—Proof that the instrument was forged by the accused, and that he attempted to pass it in the county where indicted, is *prima facie* proof that the forgery was committed in that county.⁷ And possession of notes and implements in that county is *prima facie* evidence that the forgery was committed there.⁸ But where the forged instrument was found in the prisoner's possession at W., where he

¹ *Com. v. Stearns*, 10 Met., 256; *Reg. v. Ashton*, 2 Russ. on C., 406; *Rex v. Smith*, 4 Car. & P., 411; *McCartney v. State*, 3 Port. Ind., 353; *People v. Coffey*, 4 City Hall Rec., 52; *contra*, *Rex v. Smith*, 2 Car. & P., 633.

² 2 Arch. C. P. & Pl., 812; *Willard's Case*, Russ. & Ry., 245; *State v. Hooper*, 2 Bailey, 37; *People v. Lagville*, 1 Wheeler C. C., 412.

³ *Rex v. Forbes*, 7 Car. & P., 224; *Rex v. Willard*, Russ. & Ry. C. C., 245; *State v. Williams*, 27 Vt., 724.

⁴ 3 Greenl. Ev., § 111; *Rex v. Phillips*, 1 Lewin C. C., 105; *State v. Herten*, 2 Penn., 672; *Com. v. Biglow*, 8 Met., 235; *Rex v. Forbes*, 7 Car. & P., 224; *Reg. v. Cooke*, 8 Car. & P., 586; *Reg. v. Butler*, 2 Car. & K., 221.

⁵ *State v. Cochran*, 2 Dev., 63.

⁶ *State v. Morton*, 8 Wis., 352.

⁷ *Bland v. People*, 3 Scam., 364; *Bishop v. State*, 30 Ala., 34, 39; *State v. Thompson*, 19 Iowa, 304.

⁸ *Spencer v. Com.*, 2 Leigh, 751.

then resided, but it bore date at S., at a previous time, when he dwelt in the latter place, this was held not sufficient evidence of the commission of the offense in W.¹ Yet the bare possession of a forged note in a county, together with the entire want of evidence of a prior possession elsewhere, has been held to be sufficient evidence to authorize the jury to infer that the note was forged in such county.²

§ 571. *Continued.* — Under our statute proof of putting a letter in a postoffice containing a forged instrument, directed to a person in another county, would probably be held to be sufficient evidence of a publication of such instrument, or an attempt to pass it at the place where the letter was mailed,³ though under the New York statute it was held not to be a sufficient uttering and publishing to allow the venue to be laid there.⁴

§ 572. *Attempting to Utter, etc., Counterfeit Money — Uttering, etc.* — Staking counterfeit money at a game as good, is an attempt to utter or pass the same; and losing it at play is a passing the same against law.⁵ Where a good shilling was given to a Jew boy for fruit, and he put it in his mouth under the pretence of trying whether it were good, and then taking a bad shilling out of his mouth instead of it, returned it to the prosecutor saying it was not good, this was held to be an uttering and passing within the meaning of the statute.⁶

2. COUNTERFEITING.

§ 573. *Coin.* — “Every person who shall counterfeit any

¹ *State v. Jones*, 1 McMullan, 236; *Com. v. Parmenter*, 5 Pick., 279.

² *Johnson v. State*, 35 Ala., 370; *State v. Morgan*, 2 Dev. & Bat., 348; *contra*, *Rex v. Crocker*, 2 Leech, 987, *Russ. & Ry.*, 987; *Rex v. Parkes*, 2 East P. C., 992; *Com. v. Parmenter*, 5 Pick., 279.

³ *People v. Rathbun*, 21 Wen., 535; *Rex v. Williams*, 2 Camp., 507; *Rex v. Burdett*, 4 Barn. & Ald., 95; *U. S. v. Worrall*, 2 Dall., 384, 388; *Rex v. Higgins*, 2 East P. C., 5; *Rex v. Burdett*, 4 Barn. & Ald., 95.

⁴ *People v. Rathbun*, 21 Wen., 509; *Bishop v. State*, 30 Ala., 34.

⁵ *State v. Beeler*, 1 Brev., 482.

⁶ *Rex v. Franks*, 2 Leach, 644.

species of gold or silver coin,¹ current by law² or usage in this state, or any foreign state or country, or shall pass or give in payment, or offer to pass or give in payment, such counterfeited coin, or permit or cause or procure the same to be altered or passed, with intention to defraud any person, body politic or corporate, knowing the same to be counterfeited, shall be deemed guilty of counterfeiting, and imprisoned in the penitentiary for a term not less than one year nor more than fourteen years."³

STATEMENT OF THE OFFENSE OF COUNTERFEITING.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, feloniously, unlawfully and fraudulently did counterfeit ten pieces of gold coin of the United States, then and there current by law and usage in the said state of Illinois called dollars,⁴ with the intention thereby⁵ to defraud some person, body politic or corporate,⁶ contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF PASSING COUNTERFEITED COIN.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, feloniously,⁷ unlawfully and fraudulently did pass (or "*give in pay-*

¹ It has been held under a similar statute that a "California five dollar gold piece" was not a "coin current by law or usage within the state;" because manufactured in violation of the Constitution of the United States. *Com. v. Boyd*, 1 Gray, 564.

² The words, "current by law, etc.," mean current at the time the counterfeit is made. *State v. Shoemaker*, 7 Mo., 177; *Nicholson v. State*, 18 Ala., 529.

³ R. S., 368, § 111.

⁴ The word "dollars" sufficiently describes the coin. *Peck v. State*, 2 Humph., 78; *Com. v. Stearns*, 10 Met., 256. The materials of which the coin was made need not be averred. *State v. Griffin*, 18 Vt., 198. The words "of the likeness, similitude, etc.," are sometimes, but not necessarily, inserted. *State v. Griffin*, 18 Vt., 198; *Fight v. State*, 7 Ohio, 180.

⁵ The insertion of the words "then and there," after the word "intention" is unnecessary. *Com. v. Doherty*, 10 Cush., 52.

⁶ An indictment charging "the counterfeiting of good and legal coin of the state of Missouri, called a Mexican dollar" is bad, the words being contradictory and repugnant. *State v. Shoemaker*, 7 Mo., 177.

⁷ In Wisconsin the word "feloniously" is unnecessary. *Wilson v. State*, 1 Wis., 184; and see *Quigley v. People*, 1 Scam., 301; *Miller v. People*, 2 Scam., 233.

ment" or "offer to pass" or "offer to give in payment") three counterfeited pieces of gold coin in the likeness and similitude of the good, legal and current money of the United States, coined by the United States, called dollars,¹ then and there current by law and usage in the said state of Illinois, to the said A. B.,² as true and genuine, then and there³ knowing the said counterfeited coin to be counterfeited, with intent thereby to defraud the said A. B.,⁴ contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 574. **Jurisdiction of State Courts in Case of Counterfeiting.** — In the state of Missouri it was held that the state courts had no jurisdiction of the crime of counterfeiting the coins of the United States;⁵ but according to the weight of authority the state courts have concurrent jurisdiction with the courts of the United States over such offense.⁶ And in several of the state courts parties have been indicted for offenses relating to current coin of the United States and no exception has been taken to the jurisdiction.⁷

§ 575. **Evidence — Production of the Coin.** — The forged coin

¹ It is sufficient to describe the coin as "made and counterfeited to the likeness and similitude of good, true and correct money, and silver coins currently passing in the state and commonly called Spanish dollars." *Fight v. State*, 7 Ham., 180; and see *Smith v. State*, 8 Ham., 294.

² The allegation that the coin was passed to a particular person is material and must be proved as alleged. *Gabe v. State*, 1 Engl., 540; *Rouse v. State*, 4 Ga., 136, 139, 140; but see *Gentry v. State*, 6 Ga., 503.

³ The words "then and there" may be omitted. *Reg. v. Jones*, 9 Car. & P., 761; see also *Reg. v. Page*, 9 Car. & P., 756.

⁴ In Iowa, in an indictment for passing counterfeit money, the name of the person intended to be defrauded may be omitted. *State v. Barrett*, 8 Iowa, 536.

⁵ *Mattison v. State*, 3 Mo., 421; *Rouse v. State*, 4 Ga., 136; *State v. Shoemaker*, 7 Mo., 177.

⁶ 1 Bish. Cr. L., § 178; 2 Bish. Cr. L., § 285; *Chess v. State*, 1 Blackf., 198; *Sutton v. State*, 9 Ohio, 133; *State v. Antonio*, 2 Const., 776; *State v. Tutt*, 2 Bailey, 441; 3 Brev., 652; *Harlan v. People*, 1 Doug., 207; *Houston v. Moore*, 5 Wheat., 1; *Com. v. Fuller*, 8 Met., 313; *Sutton v. State*, 9 Ham., 133; *Pug v. Com.*, 16 Pet., 630; *Fox v. Ohio*, 5 How. U. S., 410; *Manley v. People*, 3 Sell., 295; *Hendrick v. Com.*, 5 Leigh, 707; *State v. Pitman*, 1 Brev., 32.

⁷ *State v. Young*, 1 Overt., 230; *Peck v. State*, 2 Humph., 78; *Rasnick v. Com.*, 2 Va. Cas., 356; *State v. Collins*, 3 Hawks, 191; *State v. Bowman*, 6 Vt. 594; *Miller v. People*, 2 Scam., 233.

must be produced before any evidence of its want of genuineness can be received,¹ or its absence accounted for as in the case of a forged written instrument.² In one case it has been held that in a prosecution for passing counterfeit coin to a person who resides in another state, if a subpoena for such person as a witness has been issued and returned not found, the fact of passing, and the counterfeit character of the coin may be proved without producing the coin or accounting for its non-production.³

§ 576. **Evidence of Counterfeiting.** — The counterfeiting is usually proved by circumstantial evidence,⁴ such as finding the necessary coining tools or counterfeit pieces of money, either in a finished or unfinished state, in the defendant's possession.⁵

§ 577. **Judicial Notice Taken of the Existence of Coins — Variance.** — The courts will take judicial notice of the existence of the genuine American and foreign coins made current by statute.⁶ And where the indictment described the coins falsely made as "fifty cent pieces" and "twenty-five cent pieces," instead of "half dollars" and "quarter dollars" which are the words of the statute, the variance was held not to be material.⁷ "United States gold coin" is equivalent to gold coin of the United States; such coin is current by law, and both court and jury know without allegations that gold coin of the denomination and value of ten dollars is an eagle.⁸ A variance between the indictment and number of the pieces of the coin alleged to be counterfeited is immaterial; but a variance as to the denomination of such coin is fatal.⁹

578. **Evidence of Resemblance to Genuine Coin — Of Intent to**

¹ *State v. Osborn*, 1 Root, 152.

² *State v. Phelps*, 2 Root, 87.

³ *Kirk's Case*, 9 Leigh, 627.

⁴ 2 Bish. Cr. P., § 254.

⁵ *U. S. v. Burns*, 5 McLean, 23; *U. S. v. King*, 5 McLean, 208; *State v. Antonio*, 2 Const., 776, 3 Brev., 562; *contra*, *Stalker v. State*, 9 Conn., 341.

⁶ *U. S. v. Burns*, 5 McLean, 23; *U. S. v. King*, 5 McLean, 208.

⁷ *Id.*

⁸ *Dailey v. State*, 10 Ind., 536; *Reg. v. Connell*, 1 Car. & K., 190.

⁹ 2 Bish. Cr. P., § 254.

Defraud. — The jury should be satisfied that the resemblance of the forged to the genuine piece is such as might deceive a person of ordinary caution.¹ If this is not the case it cannot be inferred that the counterfeit money was for a fraudulent use.² The giving of a counterfeit coin in charity is not an uttering within the statute, although the party knows it to be counterfeit; for there must be some intention to defraud.³ And it must be proved that the defendant intended to pass the spurious coin as genuine as evidence of an intent to defraud, for if it appear that the coin was made for any other purpose, though that purpose be not justifiable in a moral point of view, the defendant must be acquitted.⁴

§ 579. **Passing Other Coins — Proof of Guilty Knowledge — Intent.** — Evidence that the defendant had passed other counterfeit coins at other times, either before or after the offense for which he is indicted, is admissible in evidence to show that he knew the money passed by him in the particular case was counterfeit money.⁵ But on an indictment for counterfeiting a silver dollar, proof that the defendant had counterfeited other dollars was held not to be admissible.⁶ The mere possession of instruments of coining is sometimes pertinent to show guilty knowledge.⁷ The making of counterfeit coin being established by evidence, the intent to use it to defraud will be presumed.⁸

¹ U. S. v. Morrow, 4 Wash. C. C., 733; Rex v. Elliott, 1 Leach, 175; Rex v. Varley, 1 East P. C., 164; Rasnick v. Com., 2 Va. Cas., 356.

² U. S. v. Burns, 5 McLean, 23; Rex v. Callicott, Russ. & Ry., 212, 4 Taunt., 300; Rex v. Ridgley, 1 East P. C., 171; Com. v. Kent, 6 Met., 221.

³ R. v. Page, 8 Car. & P., 122; but see R. v. —, Cox C. C., 250.

⁴ U. S. v. King, 5 McLean, 208.

⁵ Powers v. State, 4 Humph., 274; Rex v. Whiley, 2 Leach, 983; Peck v. State, 2 Humph., 78; Tharp v. State, 15 Ala., 749, 756.

⁶ State v. Odel, 3 Brev., 552.

⁷ State v. Antonio, 2 Tread, 776, 3 Brev., 562.

⁸ State v. McPherson, 9 Iowa, 53.

3. HAVING POSSESSION OF COUNTERFEIT COIN, FORGED AND COUNTERFEIT PUBLIC SECURITIES, BANK BILLS, ETC.

§ 580. *Provisions of the Statute.* — “Every person who shall have in his possession or receive for any other person any counterfeit gold or silver coin or coins of the species current by law or usage in this state, with intention to utter or pass the same, or to permit, cause or procure the same to be uttered or passed, with intention to defraud any person or body politic or corporate, knowing the same to be counterfeit, shall be imprisoned in the penitentiary not less than one nor more than fourteen years.”¹

STATEMENT OF THE OFFENSE OF HAVING POSSESSION OF COUNTERFEIT COIN WITH INTENT TO PASS IT.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, feloniously, unlawfully and fraudulently did² have in his possession ten counterfeited silver coins, made and counterfeited to the likeness and similitude of the good and legal current money of the United States,³ coined by the United States, commonly called half dollars, of the species then and there current by law and usage of this said state of Illinois, with intention to utter and pass the said counterfeit coin, with intention to de-

¹ R. S., 368, § 112. For the statute relating to having in possession, bank bills, public securities, etc., see *ante* § 555.

² An indictment was held to be sufficient which alleged that at the time and place named, the defendant “had in his custody and possession a certain false and counterfeit coin, counterfeited in the likeness and similitude of the good and legal silver coin current in this commonwealth, by the laws and usages thereof called a dollar, with intent, etc. *Com. v. Stearns*, 10 Met., 256; *Peck v. State*, 2 Humph., 78. And proof that the counterfeit coin was in the similitude of a Mexican dollar was held sufficient to sustain the indictment, *Id.* So it has been held that the words “made and counterfeited to the likeness and similitude of the good and true and current money, and silver coins currently passing in the state, commonly called Spanish dollars,” are a sufficient description of the coins. *Fight v. State*, 7 Ham., 180.

³ An indictment in Iowa need not allege that the coin was counterfeited in the similitude of the current coin of the United States, nor is it necessary to aver that it was of any value. *State v. Williams*, 8 Iowa, 533. In Vermont an indictment need not allege that the coin counterfeited was “current by law or usage in this state.” *State v. Griffin*, 18 Vt., 198; see also *Scott v. Com.*, 14 Grat., 687.

fraud some person, body politic or corporation, the said C. D. then and there well knowing the said counterfeit coin to be counterfeit, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*)

STATEMENT OF THE OFFENSE OF HAVING IN POSSESSION A FORGED BANK BILL WITH INTENT TO PASS IT, ETC.¹

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, feloniously,² unlawfully and fraudulently did have in his possession a certain forged and counterfeited bank bill,³ purporting to have been issued by the (*insert the name of the bank*) with intent to utter and publish the same as true and genuine, with intent to injure and defraud the said bank, which said forged and counterfeited bill is in the words and figures following (*insert an exact copy of the bill*), the said C. D. then and there well knowing the said bill to be forged and counterfeited, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 581. **Evidence.** — The prosecutor must prove: 1, the possession of the coin or counterfeit instrument;⁵ 2, the knowledge of its being counterfeit; and, 3, the intention to pass it with a view to defraud.⁶ Where pieces of counterfeit coin are found on one or two persons acting in guilty concert and both knowing of the possession, both are guilty under the statute.⁷ Where the indictment charges that the defendant had in possession certain counterfeit bills purporting to be

¹ For another form see *Stone v. People*, 3 Scam., 327.

² Under the former statute it was held not to be necessary to allege that the offense was committed feloniously, infamously or criminally; and that if the offense was charged in the language of the statute it was sufficient. *Quigley v. People*, 2 Scam., 301.

³ It is not necessary to allege in an indictment for having in possession a forged bank bill that it is for the payment of money. *Townsend v. People*, 3 Scam., 326.

⁴ It is not necessary to allege that the bank was incorporated. *Quigley v. People*, 2 Scam., 301.

⁵ *State v. Pepper*, 11 Iowa, 347.

⁶ The Possession of the counterfeit coin as contemplated may consist in having it deposited in a secret place, within the knowledge and control of the accused. *State v. Washburne*, 11 Iowa, 245; *Brown v. People*, 4 Gilm., 439; *State v. Arthur*, 21 Iowa, 325.

⁷ 2 Bish. Cr. P., § 268, 2 Arch. C. P. & Pl., 917, 920, 921; *R. v. Rogers*, C. & M., 260; *R. v. Williams*, C. & M., 259.

on certain banks which are named, with intent to pass them, it must be proved that the bills in the defendant's possession purported to be on the banks specified in the indictment; but it is not necessary to prove that it was the intention of the defendant to pass the bills in the state.¹

4. MAKING OR KNOWINGLY HAVING IN POSSESSION COUNTERFEITING TOOLS.

§ 582. *Provisions of the Statute.* — "Every person who shall make, mend, or knowingly have in his possession, any die or dies, plate or plates, or any apparatus, paper, metal, machine or other thing whatever, made use of in counterfeiting the coin current by law or usage in this state, or in counterfeiting public securities, bank notes or bills, whether such bank be situate in this state or not, shall be imprisoned in the penitentiary not less than one year nor more than fourteen years; and such dies, plates, apparatus, paper, metal or machine intended for the purpose aforesaid, shall be destroyed or sold, if in the opinion of the court the same may properly be sold, and the proceeds, after payment of costs, shall be paid into the county treasury for the use of the county."²

STATEMENT OF THE OFFENSE OF KNOWINGLY HAVING IN POSSESSION COUNTERFEITING TOOLS.³

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, feloniously,⁴ fraudulently and⁵ knowingly,⁶ did have in his posses-

¹ *Clark v. Com.*, 16 B. Monr., 206.

² R. S., 368, § 113.

³ For form of indictment, see *Miller v. People*, 2 Scam., 233.

⁴ Before this offense was made a felony by statute, the word "feloniously" was unnecessary. *Miller v. People*, 2 Scam., 233.

⁵ It is sufficient to state the offense in the language of the statute. *Miller v. People*, 2 Scam., 233; *Bradford v. State*, 3 Humph., 370; *State v. Bowman*, 6 Vt., 594; *Harlan v. People*, 1 Doug. Mich., 207; *Com. v. Scott*, 1 Rob. Va., 696; *State v. Collins*, 3 Hawks, 191.

⁶ The word "knowingly" sufficiently alleges the defendant's knowledge of the character of the implement. *Sutton v. State*, 9 Ohio, 133.

sion a certain die,¹ made use of in counterfeiting the coin, *to wit*: the good and legal money of the United States, coined by the United States, called dollars, then and now current by law and usage in the said state of Illinois, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 583. **Evidence.** — In order to convict the defendant, it must be proved that he knowingly had in his possession some instrument named in the indictment.²

5. FORGING AND COUNTERFEITING SEALS AND SIGNATURES OF OFFICERS.

§ 584. **Provisions of the Statute.** — “Every person who shall fraudulently forge, deface, corrupt or counterfeit the seal of this state, or the seal of any court or public officer, by law entitled to have and use a seal, or the seal of any public, municipal or private corporation, or shall make use of the same, or shall forge or counterfeit the signature of any public officer, or shall unlawfully and corruptly or with evil intent, affix, any of the said true seals to any commission, deed, warrant, pardon, certificate or other writing, or who shall have in his possession or custody any such counterfeit seal, and shall willfully conceal the same, knowing it to be falsely made and counterfeited, shall be imprisoned in the penitentiary not less than one nor more than twenty years.”³

¹ The word “die” is a sufficient description of the instrument. *Com. v. Scott*, 1 Rob. Va., 696; and the word “puncheon” has also been held to be a sufficient description of the instrument. *Rex v. Ridgley*, 1 East P. C., 171; *Rex v. Foster*, 7 Car. & P., 495. It is not necessary to allege or prove of what metal or material the die was made. *Rex v. Oxford*, Russ. & Ry., 382; *Rex v. Phillips*, Russ. & Ry., 369; but see *Miller v. People*, 2 Scam., 233. But where the instrument alleged that the prisoner had in his possession a die made of *iron and steel*, and it appeared from the proof that the die was made of *zinc and antimony*, it was held that the variance was fatal. *People v. Dorset*, 5 City Hall Rec., 77. Yet where it was alleged that the die was of iron and steel, proof that the die was of either metal was held sufficient: *Rex v. Oxford*, Russ. & Ry., 382; *Rex v. Phillips*, Russ. & Ry., 369, 371.

² *People v. State*, 6 Blackf., 95.

³ R. S., 369, § 114.

STATEMENT OF THE OFFENSE OF FORGING SEAL OF THIS STATE.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, feloniously, unlawfully and fraudulently did forge and counterfeit the seal of this said state of Illinois, contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

SECTION VI.

CHEATING, SWINDLING AND DEFRAUDING.

§ 585. Cheating by the Confidence Game.

586. Indictment.

587. Cheating by Using False Weights and Measures.

588. Swindling by Cards—Sleight-of-Hand, etc.

589. Obtaining Signatures or Goods by False Pretenses, etc.

590. Obtaining Credit by False Pretenses, etc.

591. Evidence—False Token.

592. What False Pretenses.

593. Continued—A Promise is not a False Pretense—Opinion.

594. False Pretenses held Sufficient to Sustain an Indictment.

595. Proof of the False Pretenses Substantially as Alleged is Sufficient.

596. Evidence that the Pretenses were Known to be False.

597. Evidence that the Property, etc., was Obtained by the False Token, Pretenses, etc.

598. Of the Ownership of the Property Obtained.

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602. False Heir.

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604. Continued—Performing Various Acts.

605. Frauds on Gas Companies.

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607. Fraudulent Stock—Issuing.

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609. Fraudulent Sale of Lands.

610. Fraudulent Conveyance of Real or Personal Property.

611. Fraudulent Acknowledgment.

612. Fraudulent Receipts.

- § 613. Removal of Warehouse Goods.
- 614. Setting up of Lotteries.
- 615. Permitting Lotteries.
- 616. Selling Lottery Tickets, etc.
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- 619. What a Lottery.
- 620. What a Sale of a Lottery Ticket.

1. CHEATING.

§ 585. **By the Confidence Game.** — “Every person who shall obtain, or attempt to obtain, from any other person or persons, any money or property, by means or by use of any false or bogus checks, or by any other means, instrument or device, commonly called the confidence game, shall be imprisoned in the penitentiary not less than one year nor more than ten years.”¹

§ 586. **Indictment.** — “In every indictment under the preceding section, it shall be deemed and held a sufficient description of the offense, to charge that the accused did, on, etc., unlawfully and feloniously obtain, or attempt to obtain, as the case may be, from A. B. (here insert the name of the person defrauded or attempted to be defrauded) his money (or property, in case it be not money), by means and by use of the confidence game.”²

STATEMENT OF THE OFFENSE OF CHEATING BY THE CONFIDENCE GAME.³

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, unlawfully and feloniously did obtain (or “*attempt to obtain*”) from the said A. B. thirty dollars of his money, by means and use of the confidence game, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 587. **By Using False Weights and Measures.** — “If any person shall knowingly sell by false weights or measures, or shall

¹ R. S., 366, § 98.

² Id., § 99. This section of the statute is constitutional. *Morton v. People*, 47 Ills., 468.

³ For form of an indictment held good, see *Morton v. People*, 47 Ills., 468.

knowingly use false measures at any mill, in taking toll for grinding corn, wheat, rye or other grain, he shall be deemed a common cheat, and, on conviction, shall be fined not less than two hundred dollars, and imprisoned not exceeding three months.”¹

STATEMENT OF THE OFFENSE OF SELLING BY FALSE WEIGHTS.

(Commence as in the form on page 35) that C. D., on, etc., at, etc., in said county, knowingly, unlawfully and willfully did sell to the said A. B. by false weights a large quantity of sugar, then and there weighed by the said false weights, thereby causing the same to appear of greater weight, *to wit.*, of greater weight by one ounce in every pound of the said sugar weighed, than the real and true weight thereof, contrary to the form of the statute in such case made and provided (*conclude as in the form on page 35*).

2. SWINDLING BY CARDS, SLEIGHT OF HAND, ETC.

§ 588. Provisions of the Statute. —“Whoever, by the game of “three-card monte,” so called, or any other game, device, sleight-of-hand, pretensions to fortune-telling, trick, or other means whatever, by use of cards or other implements, or instruments fraudulently obtains from another person property of any description, shall be punished as in case of larceny of property of like value.”²

STATEMENT OF THE OFFENSE OF SWINDLING BY A GAME WITH CARDS.

(Commence as in the form on page 35) that C. D., on, etc., at, etc., in the said county, by a game by the use of cards, feloniously and fraudulently did obtain from the said A. B., one United States legal tender treasury note for the payment of ten dollars, and of the value of ten dollars, the goods and chattels of the said A. B., contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

3. FALSE PRETENSES.

§ 589. Obtaining Signature or Goods. —“Whoever, with intent to cheat or defraud another designedly, by color of any false token or writing, or by any false pretense, obtains the signature of any person to any written instrument, or obtains from

¹ R. S., 366, § 101.

² Id., § 100.

any person any money, personal property or other valuable thing,¹ shall be fined in any sum not exceeding two thousand dollars, and imprisoned not exceeding one year, and shall be sentenced to restore the property so fraudulently obtained, if it can be restored. No indictment for the obtaining of any property or thing by any false pretense or pretenses, shall be quashed; nor shall any person indicted for such offense be acquitted, for the reason that the facts set forth in the indictment, or appearing in evidence, may amount to a larceny or other felony; nor shall it be deemed essential to a conviction, that the property in the goods or things so obtained, shall pass with the possession to the person so obtaining it.”²

STATEMENT OF THE OFFENSE OF OBTAINING PROPERTY BY FALSE PRETENSES.³

(Commence as in form on page 35) that C. D., on, etc, at, etc., in the said county, feloniously, knowingly and designedly did falsely pretend to the said A. B. that a certain watch which the said C. D. proposed to trade and did trade to the said A. B. for one horse,⁴ of the value⁵ of one hundred and fifty dollars, the property of the said A. B.,⁶ was a gold watch of the best

¹ To obtain an indorsement or credit upon a promissory note is not obtaining property or other valuable thing within the meaning of the statute. *State v. Moore*, 15 Iowa, 412.

² R. S., 366, § 96; *Rainforth v. People*, 61 Ills., 365.

³ Forms of indictments, see *People v. Crissie*, 4 Denio, 526; *Fenton v. People*, 4 Hill, 126; *State v. Kube*, 20 Wis., 217; *Com. v. Coe*, 115 Mass., 481.

⁴ All the property the defendant obtained by the false pretenses need not be stated, for if he obtained more it does not constitute a variance. *People v. Parish*, 4 Denio, 153. The property obtained must be sufficiently described. The description “a sealed package of the value of sixty dollars of the proper goods, chattels and property of the said Christian Kube,” was held not be sufficiently certain. *State v. Kube*, 20 Wis., 230.

⁵ It is not necessary to allege that the property is of any particular value. *People v. Stetson*, 4 Barb., 151; *State v. Dow*, 33 Me., 498. The words “goods and chattels” imply a value. *Spencer v. State*, 13 Ohio, 401; *Spears v. State*, 2 Ohio N. S., 583.

⁶ The person defrauded must be alleged to be the owner of the property. 3 Chitty Cr. L., 999; *Thompson v. People*, 24 Ills., 66; *People v. Krummer*, 4 Park. Cr. R., 217, unless there is some excuse given for omitting the averment. *State v. Lathrop*, 15 Vt., 279. And the omission is not a formal defect which is cured after verdict. *Sill v. Reg.*, 16 Engl. L. Eq., 375.

California gold, of the value of one hundred and twenty-five dollars,¹ which said false pretenses were then and there made by the said C. D., with the design and for the purpose of inducing the said A. B. to exchange and deliver the said horse to the said C. D. for the said watch,² and the said A. B., relying upon and believing the said false pretenses to be true,³ and being deceived thereby, was then and there induced by reason thereof⁴ on receiving the said watch,⁵ to exchange and deliver the said horse to the said C. D. therefor; by which said false pretenses the said C. D. then and there, with intent⁶ to cheat and defraud the said A. B., feloniously, unlawfully and designedly did obtain the said horse⁷ from the said A. B.; whereas in truth and in fact, the said watch was not⁸ gold, nor of the best, or any other kind

¹ In an indictment the false pretenses employed must be set forth. *Barb. Cr. L.*, 129; *Rex v. Mason*, 2 T. R., 581; *Rex v. Munroe*, 7 Mod., 315; *Burrows v. State*, 7 Engl., 65; *Glacken v. Com.*, 3 Met. Ky., 232; *Lambert v. People*, 9 Cowen, 579; *contra*, *Ross v. U. S.*, *Morris' Iowa*, 164, though all the false pretenses used to induce the party to part with his money or property need not be charged. *Rex v. Hill*, *Russ. & Ry.*, 190; *Britt v. State*, 9 *Humph.*, 31; *State v. Dunlap*, 24 *Me.*, 77; *State v. Mills*, 17 *Me.*, 211.

² It must be alleged that the false pretenses were made for the purpose of effecting the sale or exchange. *State v. Philbrick*, 31 *Me.*, 401.

³ Evidence that the party deceived was unacquainted with the kind of property passed upon him is proper for the consideration of the jury. *Cowen v. People*, 14 *Ills.*, 349.

⁴ It must be averred that the party was induced to part with his property relying upon and by reason of the false pretenses. *State v. Orvis*, 13 *Ind.*, 569; *State v. Webb*, 26 *Iowa*, 262; *State v. Philbrick*, 31 *Me.*, 401; *State v. Green*, 7 *Wis.*, 676.

⁵ An allegation of receiving the falsely represented property in exchange is indispensable. *State v. Orvis*, 13 *Ind.*, 569; *Johnson v. State*, 11 *Ind.*, 481.

⁶ The allegation of an intent to cheat and defraud is necessary. *Com. v. Dean*, 110 *Mass.*, 64; *Com. v. Lannan*, 1 *Allen*, 590; but the averment that C. D. did receive and obtain the said goods of the said A. B., from said A. B., by means of the false pretenses aforesaid, and with intent to cheat and defraud the said A. B. of the same goods, is a sufficient averment that the goods were designedly obtained, 104 *Mass.*, 549.

⁷ The word "obtain" imports a delivery. *Fenton v. People*, 4 *Hill*, 126. The procuring of the goods is a material fact, and if not stated with time and place judgment must be arrested. *People v. Bacon*, 7 *Wen.*, 219.

⁸ It is not necessary to negative all the pretenses set up. *Skiff v. People*, 2 *Park. Cr. R.*, 139; *People v. Stone*, 9 *Wen.*, 182, 191, or to prove all that are negated to be false. *People v. Haynes*, 11 *Wen.*, 557; *Com. v. Morrill*, 8 *Cush.*, 571; *State v. Smith*, 8 *Blackf.*, 489; *Britt v. State*, 9 *Humph.*, 31; *State v. Mills*, 17 *Me.*, 211; but those relied upon must be specifically and directly negated, for unless negated their falsity cannot be shown. *Tyler v. State*, 2 *Humph.*, 37; *Amos v. State*, 10 *Humph.*, 117; *People v. Gates*, 11 *Wen.*, 311; *People v. Miller*, 2 *Park.*, 197.

of California gold as the said C. D. did then so falsely pretend to the said A. B. on the contrary was only a galvanized watch and was not worth the sum of one hundred and twenty-five dollars, nor any other sum exceeding the sum of five dollars, and the said C. D. at the time he so falsely pretended as aforesaid well knew¹ the said pretenses to be false, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 590. Obtaining Credit By. — “Whoever, by false representation in writing signed by him, of his own respectability, wealth, or mercantile correspondence or connections, obtains credit, and thereby defrauds any person of money, goods, chattels or any valuable thing, or whoever procures another to make a false report in writing, signed by the person making the same, of his honesty, wealth, mercantile correspondence or connections, and thus obtains credit, and thereby defrauds any person of any money, goods, chattels or other valuable thing, shall be sentenced to return the money or property so fraudulently obtained, if it can be done, and shall be fined not exceeding two thousand dollars, and confined in the county jail not exceeding one year.”²

STATEMENT OF THE OFFENSE OF OBTAINING CREDIT BY FALSE PRETENSES.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, unlawfully and knowingly did falsely represent in writing signed by him the said C. D., that he the said C. D. was then solvent and worth the sum of five thousand dollars over and above all his liabilities, which said false representations in writing are in the words and figures following (*insert copy of the writing*) and were then and there made by the said C. D. for the purpose of inducing the said A. B. to sell to him the said C. D. five horses, each of the value of one hundred dollars, the goods and chattels of the said A. B., on a credit of six months, and the said A. B., relying upon and believing the said representations, and being deceived thereby, was then and there induced by reason thereof to sell the said goods and chattels to the said C. D. for the sum of five hundred dollars on a credit of six months, and the said C. D. then and there by the said false representations of his

¹ An indictment must charge that the defendant knew the pretenses were false. Barb. Cr. L., 140; Reg. v. Philpotts, 1 Car. & K., 112; State v. Wilson, 2 Mill, 135; Reg. v. Keigley, 20 Eng. L. & Eq., 546.

² R. S., 366, § 97.

wealth, signed by the said C. D., as aforesaid, unlawfully did obtain from the said C. D. a credit of six months for the purchase price of the said goods and chattels, and did then and there buy and receive the said goods and chattels from the said A. B. on the said credit to be paid for by the said C. D. in six months from the time aforesaid; and whereas in truth and in fact, the said C. D. was not then solvent, and was not then worth the sum of five thousand dollars, over and above all of his liabilities, nor any other sum of money as he the said C. D. so falsely represented, but on the contrary the said C. D. was then and there insolvent, and not worth enough to pay his debts or any part of them; and the said C. D. at the time he so falsely made the said representations well knew the same to be false, and that more than six months have elapsed since the purchase of said goods and chattels on the said credit as aforesaid, and yet the said C. D. has not paid the said six hundred dollars nor any part thereof, and was then and ever since has been and now is wholly unable so to do, and the said C. D. thereby and by means of the said false representations, and obtaining the said credit as aforesaid did then and there intentionally and unlawfully defraud the said A. B. of the said goods and chattels, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 591. Evidence — False Tokens. — 1. The prosecutor must prove the using of a false token or writing, or the making of the false pretense.¹ False words are not false tokens,² but a false measure is a false token.³ A man's genuine check, though he has no money in the bank on which it is drawn, is not a false token.⁴ If, however, he falsely represents that he has money in such bank sufficient to pay the check, or that the check is of the value of its face, he is liable for the false pretense.⁵ A piece of paper purporting to be a bank note, but the party offering it knowing there is no such bank,⁶ or, there being such a bank, knowing the bill to be counterfeit as having

¹ Roscoe Cr. Ev., 472; State v. Reidel, 26 Iowa, 430.

² Rex v. Bryan, 2 Stra., 866; Hartman v. Com., 5 Barr., 60.

³ 2 East P. C., 820; People v. Gates, 13 Wen., 311; Rex v. Burgaine, 1 Sid., 409; Com. v. Warren, 6 Mass., 72.

⁴ Rex v. Lara, 2 East P. C., 819; 6 T. R., 655; Rex v. Wavell, 1 Moody, 224; *contra*, 2 Arch. C. P. & Pl., 618; Rex v. Jackson, 3 Camp., 370; Rex v. Freeth, Russ. & Ry., 127; People v. Haynes, 14 Wen., 559.

⁵ Rex v. Jackson, 3 Camp., 370; Rex v. Parker, 7 Car. & P., 825; 2 Moody, 1; Com. v. Drew, 19 Pick., 179; Com. v. Warren, 6 Mass., 72; see Mathews v. Cowen, 59 Ills., 342.

⁶ Com. v. Speer, 2 Va. Cas., 65; Reg. v. Philpotts, 1 Car. & K., 112.

the name of a fictitious cashier countersigned to it, or worthless as not having the signatures of the bank officers attached to it, and the defect not obvious on account of the bill being worn,¹ or the bill being within his knowledge otherwise false,² or which purports falsely to be an order from one person upon another for goods or money,³ or purporting falsely to be a discharge of the debtor from his creditor to the sheriff and jailor, whereby the debtor procures his release from custody, is a false token.⁴ And false stamps put upon goods, falsely indicating that they are of a certain weight or measure, or quality or kind thrown into the market for general sale, are deemed false tokens.⁵ A forged certificate of stock is a false token.⁶

§ 592. **What False Pretenses.** — The words “false pretense” in the statute include all representations of fact then existing,⁷ whereby property has been obtained, and to which representations persons of ordinary prudence and caution would be likely to give credit.⁸ But a representation, though false, is not within the statute unless calculated to mislead a person of the ability, capacity and knowledge of the person alleged to be defrauded;⁹ although it has been held that if the false representations are used with success and the property thereby obtained, the representations are within the statute, even though they might not deceive a person of ordinary care

¹ *State v. Grooms*, 5 Strob., 158.

² *State v. Stroll*, 1 Rich., 244; *State v. Partillo*, 4 Hawks, 348; *Lewis v. Com. 2 Serg. & R.*, 551.

³ *Reg. v. Thom*, C. & M., 206.

⁴ *Rex v. Fawcett*, 2 East P. C., 862.

⁵ *Rex v. Edwards*, Trempp. P. C., 103, 2 East P. C., 820; *People v. Gates*, 13 Wen., 311, 319; *Respublica v. Powell*, 1 Dall., 47; *State v. Wilson*, 2 Mill, 135, 139; but see *Rex v. Wheatley*, 2 East P. C., 819, 820; 2 Burrow, 1125; *Wright v. People*, Breese, 66, 2d Ed., 102.

⁶ *Com. v. Coe*, 115 Mass., 481.

⁷ 3 Chitty Cr. L., 998.

⁸ *People v. Haynes*, 11 Wen., 566; *Rex v. Young*, 3 T. R., 98; *People v. Johnson*, 12 John., 292.

⁹ *State v. Simpson*, 3 Hawks, 620; *Com. v. Wilgus*, 4 Pick., 178; *People v. Williams*, 4 Hill, 9; *Cowen v. People*, 14 Ills., 348.

and caution.¹ Exhibiting a forged warrant for another for a rape and pretending it to be true, and thereby obtaining a watch from him in settlement, is not within the statute.² But where one by himself and through another acting as his agent, pretended to a third person that he had a warrant issued by competent authority to arrest such third person's daughter for a public offense, punishable by fine and imprisonment, whereby he obtained from him goods and money to the value of one hundred dollars, the case was held to be within the statute.³ Evidence that J. S., by falsely pretending to be a dealer in machines, that he was authorized by persons in another state, whom he named (but who were fictitious persons) to give orders in their behalf for the purchase of such machines, to be sent to them there by a common carrier, induced the dealer to deliver the machines to the carrier addressed as ordered, intending to receive them himself, and did so receive them, will sustain an indictment against him for obtaining the machines by false pretenses in the county where he made the pretenses and the machines were delivered to the carrier.⁴

§ 593. Continued.—A Promise is not a False Pretense. — The pretense must be some past event or existing fact, made for the purpose of inducing the party to part with his property.⁵ A promise to do a future act is not a false pretense within the meaning of the statute.⁶ Therefore, a pretense that a party would do an act he did not mean to do—as a pretense that he would pay for goods on delivery—is not a false pretense within the statute, but merely a false promise for future conduct.⁷ The false pretense that the prisoner intended to

¹ *People v. Adams*, 3 Denio, 190, 1 N. Y., 173; *Skiff v. People*, 2 Park. Cr. R., 147; *People v. Haynes*, 14 Wen., 546, 557; *Reg. v. Woolley*, 1 Eng. L. & Eq., 537; *Rex v. Smith*, 2 Car. & K., 882; *Cowen v. People*, 14 Ills., 348.

² *People v. Stitson*, 4 Barb., 151.

³ *Com. v. Henry*, 10 Harris, 253.

⁴ *Com. v. Taylor*, 105 Mass., 172.

⁵ *Dillingham v. State*, 5 Ohio N. S., 280.

⁶ *Rex v. Douglass*, 1 Moody, 462; *State v. Dow*, 27 Iowa, 273; but see *Com. v. Walker*, 108 Mass., 309.

⁷ *Roscoe Cr. Ev.*, 465; *Rex v. Goodhall*, Russ. & Ry., 461.

marry and wanted the money obtained to pay for a wedding suit, is not sufficient to sustain a conviction.¹ In like manner a pretense that the defendant will pay over money which he may receive,² or will make an assignment of a particular chose in action, is insufficient because it is merely a promise.³ So any representation or assurance in relation to a future event is not a statutory false pretense.⁴ In all cases the false statement must be one of fact, and not merely a false statement of opinion.⁵

§ 594. *False Pretenses held Sufficient to Sustain an Indictment.*—Indictments have been maintained under the statute against false pretenses—for obtaining pay for the carriage of goods upon the false pretense that the accused had delivered them and taken a receipt for the same which he had lost or mislaid;⁶ for making a false account of the number of workmen employed in a certain business, by which the person intrusted to pay them obtained a larger sum than was due them for their wages;⁷ for obtaining goods and money upon a forged note of hand;⁸ for pretending by the defendant that he was intrusted by the Duke of L. to take some horses from Ireland to London for him, and that he had been detained so long by contrary winds that his money was all spent;⁹ for falsely pretending to be the servant of another and to be sent by him to get the article obtained;¹⁰ for falsely pretending that sheep

¹ *Reg. v. Johnson*, 2 Moody, 356; *Reg. v. Copeland, C. & M.*, 516.

² *Glacken v. Com.*, 3 Met. Ky., 232.

³ *McKenzie v. State*, 6 Engl., 594; *Reg. v. Burgon*, 36 Engl. L. & Eq., 615; *Rex v. Douglass*, 1 Moody, 462.

⁴ *State v. Macgee*, 11 Ind., 154; *Burrow v. State*, 7 Engl., 65; *Rex v. Douglass*, 1 Moody, 462; *contra*, *Rex v. Young*, 3 T. R., 98; *Reg. v. Christy*, 1 Cox., 239.

⁵ *Reg. v. Bryan*, 40 Eng. L. & Eq. 589; *Ruse v. Wyman*, 9. Ga., 430; *State v. Estes*, 46 Me., 150; *In re Greenough*, 31 Vt., 279; *State v. Webb*, 26 Iowa, 262; *People v. Tompkins*, 1 Park. Cr., R., 224, 236.

⁶ *R. v. Airey*, 2 East P. C., 831, 2 East R., 30.

⁷ *R. v. Witchell*, 2 East P. C. 830.

⁸ 3 Chitty Cr. L., 998.

⁹ *Rex v. Young*, 3 T. R. 101, 103.

¹⁰ *People v. Johnson*, 12 John, 292; *Com. v. Hurlburt*, 12 Met., 446.

offered for sale were free from the foot ail, and that their apparent lameness was owing to an accident whereby a sale of the sheep was effected;¹ for falsely pretending that a watch was a gold watch of the value of one hundred and twenty-five dollars, whereby a sale of the watch was effected for fifty dollars;² for falsely pretending that the property the accused was parting with belonged to himself, and was unincumbered, accompanied with a false warranty and thereby obtaining property in exchange for it;³ and for obtaining by false pretense the signature of another to a note which the party defrauded had been obliged to pay.⁴ Obtaining money as a charitable donation by such false pretenses as are commonly resorted to by beggars has been held not to be indictable;⁵ but the better opinion seems to be that such false pretenses are within the statute and indictable.⁶ False pretenses may be made by acts as well as by words.⁷

§ 595. **Proof of the False Pretenses Substantially as Alleged is Sufficient.**—Any variance in substance between the pretense laid and that proved is fatal.⁸ But the same strictness required in actions for slander and on indictments for libel, forgery and the like in proving the exact words is not necessary. Proof of the substance of the alleged pretense is all that is required.⁹ If several false pretenses are set out in the indictment it is sufficient if any one of them is proved.¹⁰

§ 596. **It must be Proved that the Token, Writing or Pretense**

¹ *People v. Crissie*, 4 Denio, 525.

² *Cowen v. People*, 14 Ills., 349.

³ *State v. Dorr*, 33 Me., 498; *State v. Neivelle*, 1 Mo., 248; *Reg. v. Adamson*, 1 Car. & K., 192.

⁴ *People v. Herrick*, 18 Wen., 87.

⁵ *People v. Clough*, 17 Wen., 351.

⁶ *Reg. v. Jones*, 1 Eng. L. & Eq., 533; *Reg. v. Hensler*, 11 Cox C. C., 570; *Com. v. Whitcomb*, 107 Mass., 486.

⁷ *Rex v. Freeth, Russ & Ry.*, 127; *Rex v. Barnard*, 7 Car. & P., 784; *Com. v. Drew*, 19 Pick., 179; *Cowen v. People*, 14 Ills., 351.

⁸ *Rex v. Plestow*, 1 Camp., 494; *Rex v. Douglass*, 1 Camp., 212.

⁹ *State v. Call*, 48 N. H., 126; *State v. Vanderbilt*, 3 Dutcher, 328.

¹⁰ *State v. Dunlap*, 24 Me., 77; *State v. Mills*, 17 Me., 211; *People v. Haynes*, 14 Wen., 546; *Reg. v. Hewgill*, 24 Eng. L. & Eq., 556.

was False to the Knowledge of the Accused.¹—It is not sufficient to prove that the accused believed it to be false.² Proof that the defendant knew that the place of business of a firm was shut up, and two out of three of the partners bankrupt, is not sufficient to establish the falsity of the pretense that the promissory note of such firm was good and available.³ But it is not necessary to show that none of the stockholders of a bank are solvent, or that each of them has already paid in the whole amount of his stock, to prove the falsity of the pretense that a bill of such bank was worth its nominal value.⁴ If a man passes as a good note the note of a bank which has stopped payment, yet if there is found to be liable upon it some party who is solvent, he cannot be convicted of obtaining property by a false pretense.⁵

§ 597. 3. It must be Proved that the Property was Obtained by the False Token, Writing or Pretense;⁶ for if it did not have any influence to induce the party to part with his property the accused should be acquitted.⁷ As if the false pretense was not made until after the goods were parted with,⁸ or was not believed by the person from whom the goods were obtained,⁹ or was known to be false,¹⁰ or was not relied upon.¹¹ But that the pretense proved false, need not be the only inducement to the delivery of the property. It is enough if without them delivery would not have been made.¹²

¹ *People v. Tompkins*, 1 Park. Cr. R., 224; *R. v. Henderson*, C. & M., 328; *Rex v. Dobson*, 7 East, 218; *Ranforth v. People*, 61 Ill., 363.

² *Rex v. Spencer*, 3 Car. & P., 420.

³ *Com. v. Hulbert*, 12 Met., 446; *Com. v. Stone*, 4 Met., 48.

⁴ *Com. v. Stone*, 4 Met., 43; *Reg. v. Evans*, Bell C. C., 187, 8 Cox, 257.

⁵ 2 Bish. Cr. L., § 417; *Rex v. Spencer*, 3 Car. & P., 420.

⁶ *Roscoe Cr. Ev.*, 472; *Cowen v. People*, 14 Ills., 348; *Com. v. Davidson*, 1 Cush., 33; *Rex v. Dale*, 7 Car. & P., 352; *Com. v. Coe*, 115 Mass., 481.

⁷ *People v. Miller*, 2 Park. Cr. R., 199; *Com. v. Drew*, 19 Pick., 179; *Rex v. Wittchell*, 2 East P. C., 880; *Reg. v. Eagleton*, 23 Eng. L. & Eq., 540.

⁸ *People v. Haynes*, 11 Wen., 557, 14 Wen., 546.

⁹ *People v. Stitson*, 4 Barb., 151; *Reg. v. Mills*, 40 Eng. L. & Eq., 562.

¹⁰ *Reg. v. Mills*, 40 Engl. L. & Eq., 562; *People v. Stitson*, 4 Barb., 151.

¹¹ *Rex v. Dale*, 7 Car. & P., 352; *People v. Herrick*, 13 Wen., 87; *People v. Thompkins*, 1 Park. Cr. R., 224; *Rex v. Roebuck*, 36 Eng. L. & Eq., 640.

¹² *Cowen v. People*, 14 Ills., 451; *Reg. v. Eagleton*, Dears, 515; *Reg. v. Fry*,

§ 598. 4. Proof that the Person Charged to be was the Actual Owner of the Property Obtained is indispensable,¹ but proof of an allegation that the money obtained was the property of "E. and others" is sufficient.²

§ 599. 5. Proof of an Intent to Cheat or Defraud is Indispensable.³— This frequently may be implied from the facts proved in the case.⁴ Even the proof of the falsity of the pretense authorizes the inference of an intent to defraud.⁵ But the false pretense must have been used for the purpose of perpetrating the fraud.⁶ Therefore a false representation tending to induce a party to pay a debt previously due from him, is not within the statute against obtaining property by false pretenses though payment be thereby obtained.⁷ As where A owed B a debt of which B could not obtain payment, C, a servant of B, went to A's wife and got two sacks of malt from her, saying that B had bought them of A, which he knew to be false, and took the malt to his master in order to enable him to pay himself, it was held that if C did not intend to defraud A, but only to put it in his master's power to compel A to pay a just debt, he could not be convicted of obtaining malt by false pretenses.⁸ If the party deceived is proved to have been a person of weak mind,⁹ it is proper for the jury to consider that fact in determining the intent of the accused.¹⁰ Evidence that the money was obtained to be used on the joint account of the person from whom obtained and the accused, according to a previous agreement which the party alleged to

Dears & B., 449; Reg. v. Reed, 7 Car. & P., 848; People v. Crisse, 4 Denio, 525; State v. Mills, 17 Me., 211; Rex v. Hewgill, 24 Eng. L. & Eq., 556.

¹ Roscoe Cr. Ev., 475; Rex v. Douglass, 1 Camp., 212.

² Reg. v. Dent, 1 Car. & K., 219.

³ People v. Getchell, 6 Mich., 496; Reg. v. Bloomfield, C. & M., 536; Com. v. Drew, 19 Pick., 179.

⁴ 1 Barb. Cr. L., 141; 2 Bish. Cr. P., § 190.

⁵ People v. Herrick, 13 Wen., 87.

⁶ People v. Getchell, 6 Mich., 496, 504; Com. v. Drew, 19 Pick., 179.

⁷ People v. Thomas, 3 Hill, 169; People v. Genung, 11 Wen., 18.

⁸ Rex v. Williams, 7 Car. & P., 354.

⁹ 2 Bish. Cr. L., § 434.

¹⁰ Cowen v. People, 14 Ills., 349.

have been defrauded had refused to fulfill, is proper to disprove the presumption of an intent to defraud.¹ So where a man accustomed to receive parochial relief was told by an overseer of the poor to go to work and help maintain his family, said he could not, because he had no shoes, whereupon he was supplied, while in truth he had two pair previously received of the parish, the conviction was held wrong, for the false statement was not made with intent to obtain or defraud any one of the shoes thereby obtained, but simply as an excuse for not working, and possibly with intent to evade working.²

§ 600. **Evidence Against Joint Defendants.**—After establishing a joint intent or design of several persons to obtain goods by false pretenses, the false representations made by either of them are evidence against the others;³ and evidence that one of them, with the knowledge, approbation, concurrence and direction of the others, made the false pretense charged, warrants the conviction of all.⁴ And it is not necessary, in order to convict the defendant in such case, to prove that they or either of them obtained the goods on their own account, or desired or expected to derive personally any pecuniary benefit therefrom.⁵

§ 601. **What not a Defense.**—It is no defense that the party defrauded made false representations to the defendant; or that the goods were of less value than alleged in the indictment;⁶ or that the party from whom the defendant obtained the goods laid a plan to entrap him into the commission of the offense;⁷ or that the defendant intended to pay for the goods obtained when it should be in his power to do so;⁸ or

¹ *People v. Getchell*, 6 Mich., 496, 504.

² *Roscoe Cr. Ev.*, 475; *Rex v. Wakling*, Russ & Ry., 504.

³ *Snyder v. La Framboise*, Breese, 343; *Gardiner v. People*, 3 Scam., 90; *Brennan v. People*, 15 Ill., 516.

⁴ *Cowen v. People*, 14 Ill., 348.

⁵ *Com. v. Harley*, 7 Met., 462.

⁶ *Bish. Cr. L.*, § 469; *Com. v. Morrell*, 8 Cush., 571; *contra*, *People v. Stitson*, 4 Barb., 157.

⁷ *Rex v. Ady*, 7 Car & P., 140.

⁸ *Reg. v. Naylor*, Law Rep., 1 C. C., 4; *Com. v. Coe*, 115 Mass., 482.

that the party whose signature is obtained to a written instrument has not sustained any loss.¹

4. FALSE HEIR.

§ 602. **Provisions of the Statute.** — “Every person who shall fraudulently produce an infant, falsely pretending it to have been born of parents whose child would be entitled to a share of any personal estate, or to inherit any real estate, with the intent of intercepting the inheritance of any such real estate, or the distribution of any such personal property from any person lawfully entitled thereto, shall be imprisoned in the penitentiary not exceeding ten years.”²

STATEMENT OF THE OFFENSE OF PRODUCING FALSE HEIR WITH INTENT OF INTERCEPTING AN INHERITANCE.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, feloniously and fraudulently did produce an infant, then and there falsely pretending it to have been born of parents, *to wit.*, of E. F. and G. H. his wife, whose child then and there would be entitled to inherit certain real estate owned by the said E. F. in his lifetime, described as follows: (*insert description*) with intent then and there of intercepting the inheritance of the said real estate from the said A. B., then and there lawfully entitled thereto, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

5. FALSELY PERSONATING ANOTHER.

§ 603. **Provisions of the Statute — Receiving Money or Property.** — “Whoever falsely personates or represents another, and in such assumed character receives any money or property intended to be delivered to the party so personated, with intent to convert the same to his own use, shall be deemed to have committed larceny of the money or property so obtained.”³

¹ *People v. Gennung*, 11 Wen., 20; and see *People v. Crissie*, 4 Denio, 527.

² R. S., 365, § 94.

³ *Id.*, 367, § 103.

STATEMENT OF THE OFFENSE OF RECEIVING MONEY BY FALSELY PERSONATING ANOTHER.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, feloniously and falsely did personate and represent the said A. B., and did then and there in such assumed character receive the sum of one hundred dollars in money, then and there intended to be delivered to the said A. B., with intent then and there to convert the same to his, the said C. D.'s own use; and so the said A. B. on his oath says, that the said C. D. then and there in the manner and form aforesaid, the said money the property of the said A. B. from the said A. B., feloniously did steal, take and carry away, contrary to the form of the statute in such case made and provided (conclude as in the form on page 35).

§ 604. Performing Various Acts. — "Every person who shall falsely represent or personate another, and in such assumed character shall,—

First—Marry another; or,

Second—Become bail or surety for any party in any proceeding, civil or criminal, before any court or officer authorized to take such bail or surety; or,

Third—Confess any judgment; or,

Fourth—Acknowledge the execution of any conveyance or real estate, or of any other instrument which by law may be recorded; or,

Fifth—Do any act in the course of any such proceeding or prosecution, whereby any person or body politic may be injured in any event, or his rights or interests may in any manner be effected, shall be imprisoned in the penitentiary not less than one nor more than ten years."¹

STATEMENT OF THE OFFENSE OF FALSELY PERSONATING ANOTHER AND MARRYING ANOTHER.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, feloniously and falsely did represent and personate one G. H., and did then and there in such assumed character marry the said A. B., contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

6. FRAUDS.

§ 605. **On Gas Companies.**—"Any person who, with intent to injure or defraud any gas company, body corporate or individual, shall injure, alter, obstruct or prevent the action of any metre provided for the purpose of measuring and registering the quantity of gas consumed by or at any burner, orifice or place, or cause or procure any such metre to be injured or altered, or the action thereof to be obstructed or prevented, or who shall make or cause to be made any connection with any gas pipe so as to conduct or supply illuminating or inflammable gas to any burner or orifice, from which such gas may be consumed, without passing through or being registered by a metre, shall be punished by imprisonment not exceeding three months, or by fine not exceeding two hundred and fifty dollars, or both."¹

STATEMENT OF THE OFFENSE OF FRAUDULENTLY INJURING THE METRE
OF A GAS COMPANY.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, with intent to injure and defraud the (*insert name of the company*) gas company, unlawfully and fraudulently did injure, alter, obstruct and prevent the action of a certain metre then and there provided by the said company for the purpose of measuring and registering the quantity of gas consumed by a certain burner from which gas might be consumed then and there, being in the house of the said C. D. there situate, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 606. **On Life and Accident Insurance Companies.**—"If any person shall obtain or cause to be obtained, or attempt to obtain, from any life or accident insurance company, any sum of money on any policy of life or accident insurance issued by any company doing business in this state, by falsely or fraudulently representing the person insured as dead, or shall cause any person to be insured under an assumed name, and shall falsely represent the fictitious person so insured as dead, and shall thereby obtain, cause to be obtained, or attempt to

¹ R. S., 369, § 117.

obtain, from such company the amount of such insurance, or shall falsely obtain, cause to be obtained, or attempt to obtain, from such life or accident insurance company any sum of money upon any life or accident policy of such company, by means of false and fraudulent written representations or affidavits, falsely representing that the person whose life was insured was dead, or that the person insured against accident was injured, every person so offending shall be deemed guilty of a misdemeanor, and on conviction thereof, if the sum so obtained, attempted or caused to be obtained, shall be equal to or exceed the sum of twenty-five dollars, shall be imprisoned in the penitentiary not exceeding five years; and if the sum so obtained, attempted or caused to be obtained, shall be less than twenty-five dollars, shall be fined not more than one hundred dollars, or be confined in the county jail not exceeding six months, or both, at the discretion of the court.”¹

STATEMENT OF THE OFFENSE OF OBTAINING MONEY FROM INSURANCE COMPANY BY FALSELY REPRESENTING THE INSURED AS DEAD.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county unlawfully and feloniously did obtain the sum of one thousand dollars in money from a life insurance company called (*insert the name of the company*) on a policy of life insurance issued by the said company, then and there doing business in this said State of Illinois, by then and there falsely and fraudulently representing that G. H., the person insured by the said company by virtue of the said policy as dead, whereas in truth and in fact the said G. H. was not then dead as the said C. D., then and there well knew, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

7. FRAUDULENT STOCK.

§ 607. Issuing.—“Every president, cashier, treasurer, secretary, or other officer, and every agent, attorney, servant, or employe of any bank, railroad, manufacturing or other corporation, and every other person who shall, knowingly and designedly, and with intent to defraud any person, bank, railroad, manufacturing or other corporation, issue, sell, transfer,

¹ R. S., 369, § 118.

assign or pledge, or cause or procure to be issued, sold, transferred, assigned or pledged, any false, fraudulent, or simulated certificate, or other evidence of ownership of any share or shares of the capital stock of any bank, railroad, manufacturing or other corporation, shall be punished by fine not exceeding two thousand dollars, and by imprisonment in the penitentiary not more than ten years, as the jury shall determine.”¹

§ 608. **Signing with Intent to Issue.**—Every president, cashier, treasurer, secretary, or other officer, and every agent of any bank, railroad, manufacturing or other corporation, who shall willfully and designedly sign with intent to issue, sell, pledge, or cause to be issued, sold, or pledged, any false, fraudulent, or simulated certificate or other evidence of the ownership or transfer of any share or shares of the capital stock of such corporation, or any instrument purporting to be a certificate or other evidence of such ownership or transfer, the signing, issuing, selling or pledging of which by such president, cashier, treasurer, or other officer or agent, shall not be authorized by the charter and by-laws of such corporation, or by some amendment thereof, shall be punished by fine not exceeding two thousand dollars, and by imprisonment in the penitentiary not more than ten years, as the jury shall determine.”²

STATEMENT OF THE OFFENSE OF ISSUING FRAUDULENT STOCK BY A PRESIDENT OF A RAILROAD CORPORATION.

(*Commence as in form on page 35*) that C. D. on, etc., at, etc., in the said county, then and there being president of the railroad corporation called the (*insert the name of the corporation*) feloniously, knowingly and designedly, and with intent to defraud the said railroad corporation, did issue a certain false, fraudulent and simulated certificate of ownership of ten shares of the capital stock of the said railroad corporation, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

8. FRAUDULENT SALE OF LANDS.

§ 609. **Provisions of the Statute.**—“Any person, after once

¹ R. S. 370, § 119.

² Id., § 120.

selling, bartering or disposing of any tract or tracts of land, town lot or lots, or executing any bond or agreement for the sale of any lands, or town lot or lots, who shall again knowingly and fraudulently sell, barter or dispose of the same tract or tracts of land, or town lot or lots, or any parts thereof, or shall knowingly and fraudulently execute any bond or agreement to sell or barter or dispose of the same land, or lot or lots, or any part thereof, to any other person for a valuable consideration, shall be imprisoned in the penitentiary not less than one nor more than ten years.”¹

STATEMENT OF THE OFFENSE OF SELLING LAND TWICE.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, after once selling by agreement in writing signed and sealed by the said C. D. to one E. F., a certain tract of land described as follows: (*insert description of the land*) did again feloniously, knowingly and fraudulently sell and dispose of the same tract of land to the said A. B., by agreement in writing, signed and sealed by the said C. D., contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

9. FRAUDULENT CONVEYANCE.

§ 610. **Of Real and Personal Property.** — “Every person who shall be a party to any fraudulent conveyance of any lands, tenements or hereditaments, goods or chattels, or any right or interest issuing out of the same, or to any bond, suit, judgment or execution, contract or conveyance had, made or contrived, with intent to deceive and defraud others, or to defeat, hinder or delay creditors or others of their just debts, damages or demands, or who, being a party as aforesaid, at any time shall wittingly and willingly put in use, avow, maintain, justify or defend the same or any of them as true, and done, had or made in good faith, or upon good consideration, or shall sell, alien or assign any of the lands, tenements, hereditaments, goods, chattels or other things before mentioned, to him conveyed as aforesaid, or any part thereof, shall be fined not exceeding one thousand dollars.”²

¹ R. S., 370, § 121, see *ante* § 462.

² R. S., 370, § 122.

STATEMENT OF THE OFFENSE OF BEING A PARTY TO A FRAUDULENT
CONVEYANCE.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, unlawfully did be a party to a fraudulent conveyance from the said C. D. to one E. F., of certain lands described as follows; (*insert description of the lands*) with intent to defeat, hinder and delay the said A. B., and others, then and there being creditors of the said C. D., of their just debts, damages and demands, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

10. FRAUDULENT ACKNOWLEDGMENT.

§ 611. Punishment. — “If any officer authorized to take any proof and acknowledgment of any conveyance of real or personal property, or other instrument, willfully certifies that such conveyance or other instrument was duly proven or acknowledged by any party thereto, when no such acknowledgment or proof was made, or was not made at the time it was certified to have been made, with intent to injure or defraud, or to enable any other person to injure or defraud, he shall be imprisoned in the penitentiary not less than one nor more than five years, or confined in the county jail not exceeding one year, and fined not exceeding one thousand dollars.”¹

STATEMENT OF THE OFFENSE OF TAKING A FRAUDULENT
ACKNOWLEDGMENT.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in said county, then and there being a notary public duly appointed and qualified, and authorized to take acknowledgments of deeds for the conveyance of real property in the said county, feloniously and willfully did certify that a certain conveyance of real property from E. F. to G. H., was duly acknowledged by the said E. F., a party thereto, when no such acknowledgment was in truth and in fact made, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

11. FRAUDULENT RECEIPTS.

§ 612. Issuing by Warehousemen and Others. — “Whoever fraudulently makes or utters any receipt, or other written evidence

¹ R. S., 370, § 123.

of the delivery or deposit of any grain, flour, pork, wool, salt, or other goods, wares or merchandise, upon any wharf or place of storage, or in any warehouse, mill, store or other building when the quantity specified therein has not, in fact, been delivered or deposited as stated in such receipt or other evidence of the delivery or deposit thereof, and is not, at the time of issuing the same, still in store, and the property of the person to whom or to whose agent the receipt is issued, or for the whole or any part of which any other receipt is outstanding or uncanceled, shall be imprisoned in the penitentiary not less than one nor more than ten years.”¹

STATEMENT OF THE OFFENSE OF MAKING A FRAUDULENT RECEIPT BY A WAREHOUSEMAN.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, feloniously and fraudulently did make and deliver a certain receipt to one E. F. as evidence of the delivery and deposit of one thousand bushels of wheat in the warehouse of the said C. D., by the said E. F., there situate when the quantity specified therein had not in fact been delivered nor deposited in the said warehouse as stated in the said receipt, and was not at the time of issuing such receipt then in store, nor the property of the said E. F. contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 613. Removal of Warehouse Goods. — “Whoever, having given any such receipt or written evidence of deposit or storage as is specified in the preceding section, or, being in the possession or control of such property, shall sell, encumber, ship, transfer, or in any manner remove from the place of storage, or allow the same to be done, any such grain, flour, pork, wool, salt, or other goods, wares and merchandise, without the written consent of the holder of such receipt or other evidence of deposit or storage, except in cases of necessity for the purpose of saving such property from loss or damage by fire, flood or other accident, shall be imprisoned in the penitentiary not less than one nor more than ten years.”²

¹ R. S., 371, § 124.

² Id., § 125.

STATEMENT OF THE OFFENSE OF REMOVING GOODS RECEIVED FOR STORAGE WITHOUT THE CONSENT OF THE OWNER.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, then and there having given to the said A. B. a receipt as evidence of the delivery, deposit and storage of five thousand bushels of oats, in the store-house of the said C. D., and having then and there received from the said A. B. the oats specified in the said receipt into his the said C. D.'s possession and control, and stored them in the said store-house, feloniously did remove the same from the said store-house without the consent of the said A. B., it then and there not being necessary to remove the said property for the purpose of saving the same from loss by fire, flood or other accident, contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

12. LOTTERIES.

§ 614. Setting up of. — “Whoever sets up or promotes any lottery for money, or by way of lottery disposes of any property of value, real or personal, or under pretense of a sale, gift or delivery of any other property, or any right, privilege or thing whatever, disposes of, or offers or attempts to dispose of, any real or personal property, with intent to make the disposal of such real or personal property dependent upon or connected with any chance by dice, lot, numbers, game, hazard or other gambling device, whereby such chance or device is made an additional inducement to the disposal or sale of the said property, and whoever aids either by printing or writing, or is in any way concerned in the setting up, managing or drawing of any such lottery, or in such disposal or offer or attempt to dispose of property by any such chance or device, shall, for each offense, be fined not exceeding two thousand dollars.”¹

§ 615. Permitting. — “Whoever, in a house, shop or building, owned or occupied by him, or under his control, knowingly permits the setting up, managing or drawing of such lottery, or such disposal or attempt to dispose of property, or the sale of a lottery ticket, or share of a ticket, or any other writing, certificate, bill, token or other device, purporting or intended

¹ R. S., 378, § 180.

to entitle the holder, bearer or any other person to a prize, or to a share of, or interest in a prize, to be drawn in a lottery, or in such disposal of property, and whoever knowingly suffers money or other property to be raffled for in such house, shop or building, or to be won there by throwing or using dice, or by any other game of chance, shall, for each offense, be fined not exceeding two thousand dollars."¹

§ 616. **Selling Tickets, etc.** — "Whoever sells, either for himself or for another person, or offers for sale, or has in his possession, with intent to sell or offer for sale, or to exchange or negotiate, or in anywise aids or assists in the selling, negotiating or disposing of any ticket in any such lottery, or a share of a ticket, or any such writing, certificate, bill, token or other device, or any share or right in such disposal or offer as is mentioned in this act, whether such lottery or the drawing thereof is in this state or elsewhere, shall, for each offense, be fined not exceeding two thousand dollars."²

§ 617. **Second Conviction.** — "Whoever, after being convicted of any offense mentioned in either of the four³ preceding sections, commits the like offense or any of the offenses therein mentioned, shall, in addition to the fine before provided, be confined in the county jail not exceeding one year."⁴

§ 618. **Prizes, etc., Forfeited.** — "All sums of money and every other valuable thing drawn as a prize, or as a share of a prize, in any lottery, and all property disposed of, or offered to be disposed of, by any chance or device, under the pretext mentioned in section one hundred and eighty thereof, by any person being an inhabitant or resident within this state, and all sums of money or other things of value received by any such person, by reason of his being the owner or holder of any ticket or share of a ticket in a lottery or pretended lottery, or of any share or right in any such scheme of chance, or such device, contrary to the provisions of this act, shall be forfeited, and

¹ R. S., 379, § 181.

² Id., § 182.

³ This refers to the three preceding sections and to *ante* § 259.

⁴ R. S., 379, § 184.

may be recovered by an information filed, or by an action for money had and received, brought by the attorney-general, or the state's attorney in the proper county, in the name and behalf of the people of the State of Illinois."¹

STATEMENT OF THE OFFENSE OF SETTING UP A LOTTERY.

(*Commence as in form on page 35*) that C. D., or, etc., at, etc., in said county unlawfully did set up a lottery,² for the sum of five hundred dollars in money,³ with intent⁴ to make the disposal of the said money dependent upon a chance by numbers, whereby the said chance was then and there made an additional inducement to the disposal of the said money, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

STATEMENT OF THE OFFENSE OF PERMITTING THE SETTING UP OF A LOTTERY IN A BUILDING BY THE OWNER.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, in a house⁵ owned and occupied by the said C. D., and under his control, unlawfully and knowingly did permit the setting up, managing, and drawing of a lottery, in which certain articles of personal property, *to wit.* one horse, of the value of three hundred dollars, one watch of the value of two hundred dollars, one piano of the value of one thousand dollars, the goods and chattels of one E. F., were disposed of by way of a lottery, to one G. H., contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

¹ R. S., 379, § 185.

² It is not necessary to state the name of the lottery. *Com. v. Horton* 2 Gray 69; *Com. v. Hooper*, 5 Pick., 42; *Com. v. Johnson*, Thatch. C. C., 284; *Com. v. Clapp*, 5 Pick., 41; *contra*, *Com. v. Gillespie*, 7 Serg. & R., 469.

³ The particular kind of property to be disposed of by lottery must be stated, *Markle v. State*, 3 Ind., 535.

⁴ It is essential to specify the intent for which the lottery was set up, that being a part of the description of the offense, *People v. Taylor*, 3 Denio, 91; but see *People v. Warren*, 4 Barb., 314; *Charles v. People*, 1 Com. N. Y., 180.

⁵ An indictment which alleges that the defendant, in a house occupied by him "did unlawfully and knowingly permit the setting up of a lottery in which certain articles of personal property and of value were disposed of by way of a lottery," is sufficient, without stating the name of the lottery, or describing the articles disposed of, or stating their value, or the names of their owners, or of the persons who received them as prizes. *Com. v. Horton*, 2 Gray, 69; *Solomon v. State*, 27 Ala., 26.

STATEMENT OF THE OFFENSE OF SELLING A LOTTERY TICKET.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, unlawfully did sell¹ a ticket² in a certain lottery, then and there set up to dispose of certain real property, described as follows (*insert the description of the property.*) of the value of five thousand dollars, the property of the said C. D., with intent³ to make the disposal of the said real property dependent upon a chance by numbers whereby the said chance was made an additional inducement to the disposal and sale of the said property,⁴ contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 619. What a Lottery. — The term "lottery" has no technical meaning, in law distinct from its popular signification, though it is defined to be a scheme for the distribution of prizes by chance.⁵ It has been considered unnecessary to a lottery that there should be any blanks;⁶ but there must be some property disposed of by chance or lot.⁷ An annual distribution by lot among the members of an art union is a lottery.⁸ Where it appeared that the defendant was conducting what he termed a gift sale establishment, and kept upon his

¹ A count in an indictment which alleged that the defendant "did unlawfully offer for sale and did unlawfully sell," was held not to be bad for duplicity. *Com. v. Johnson*, Thatcher C. C., 284; *Com. v. Eaton*, 15 Pick., 273.

² It is not necessary to particularly describe the ticket, or to give a copy of it. It is sufficient to describe it in the language of the act. *Dunn v. People*, 40 Ills., 466; *Freeleigh v. State*, 8 Mo., 606; *Com. v. Johnson*, Thatch. C. C., 284; *contra Com. v. Gillespie*, 7 Serg. & R., 469; *State v. Scribner*, 2 Gill & J., 246. In Missouri an indictment under the statute need not employ the term "lottery tickets." The words "device in the nature of a lottery" are sufficient. *State v. Kennon*, 21 Mo., 262.

³ It is sufficient if the intent appears argumentatively (especially after verdict). *People v. Warren*, 4 Barb., 314; *Charles v. People*, 1 Com. N. Y., 180.

⁴ In an indictment for having in possession lottery tickets, with intent to sell or offer them for sale, it is not necessary to aver the intent of the defendant to sell or offer them for sale in the county or in this state. *Com. v. Dana*, 2 Met., 329.

⁵ *Dunn v. People*, 40 Ills., 467; *Governors, etc., v. Art Union*, 7 N. Y., 239.

⁶ 2 Zab., 465; *Dunn v. People*, 40 Ills., 468; *Wooden v. Shotwell*, 4 Zab., 789.

⁷ *Dunn v. People*, 40 Ills., 466; *People v. Payne*, 3 Denio, 88; *Thomas v. People*, 59 Ills., 160.

⁸ *Governors of the Alms-house of New York v. Art Union*, 7 N. Y., 228.

desk at his place of business a box filled with envelopes purporting to contain some valuable receipts and popular songs, and also a card, descriptive of some one of an immense stock of various articles of different values worth one million and five hundred thousand dollars, all to be sold for one dollar each, without regard to the value, and not to be paid for until the purchaser of the envelope knew what he was to receive, and that the price of the envelope was twenty-five cents, an indictment was maintained under the statute and the court held that the sale of one of these envelopes was a sale of a lottery ticket, the element of chance consisting not in what the holder might do with his card and dollar after he had purchased the envelope, but in the purchase of the envelope itself, which, as was represented by the seller, would give him the right to buy for one dollar an article worth hundreds of dollars, or one of little or no value.¹ The statute prohibiting the setting up of lotteries and the sale of lottery tickets is constitutional.²

§ 620. **What a Sale of a Lottery Ticket.** — A person selling a chance in a lottery and retaining in his own hands the ticket or other evidence of the chance, sells a ticket within the meaning of the statute.³

¹ *Dunn v. People*, 40 Ills., 466.

² *Freleigh v. State*, 8 Mo., 606; *State v. Sterling*, 8 Mo., 697.

³ *Com. v. Pollard, Thatch.* C. C., 280.

SECTION VII.

OFFENSES AGAINST THE PUBLIC MORALITY, HEALTH AND
PUBLIC POLICY.

- § 621. Adulteration of Food, Candies, etc.
- 622. Of Liquor.
- 623. Of Milk.
- 624. Of Medicine.
- 625. Adultery.
- 626. Proof of Adultery.
- 627. What Sufficient Evidence of Adultery.
- 628. Bigamy—Definition and Punishment.
- 629. Proof and Venue.
- 630. Marrying a Bigamist.
- 631. Evidence of the Marriages.
- 632. When Husband or Wife may be a Witness—Effect of Absence of—
Evidence of being Alive.
- 633. Defense to an Indictment for Bigamy.
- 634. Circulating Obscene Books, etc.
- 635. Issuing or Uttering Unauthorized Currency.
- 636. Gaming Houses—Provisions of the Statute as to.
- 637. Evidence that the Gaming House was Kept by the Defendant.
- 638. Of Gaming for Money or other Valuable Thing.
- 639. Gaming in a Tavern.
- 640. Gaming Decoys.
- 641. Gambling in Grain.
- 642. Incest of Father and Daughter.
- 643. Of Relatives.
- 644. Evidence of Incest—Admissions.
- 645. Sending a Challenge for a Prize Fight—Training for.
- 646. Engaging in a Prize Fight.
- 647. Aids, Seconds, etc.
- 648. Leaving the State to Fight.
- 649. Sparring and Boxing Exhibitions.
- 650. Preventing Prize Fights, etc.

1. ADULTERATION.

§ 621. Of Food, Candies, etc. — “Whoever fraudulently adul-

terates, for the purpose of sale, bread or any other substance intended for food, or any candy or confection, with any substance which is poisonous or injurious to health, and whoever sells or offers, or keeps for sale any adulterated bread or other substance intended for food, or candy or confection, knowing the same to be so adulterated, or shall sell or offer to sell, or keep for sale any flesh of any diseased animal or other corrupt or unwholesome poison, shall be confined in the county jail not exceeding one year, or be fined not exceeding one thousand dollars, or both, in the discretion of the court.”¹

STATEMENT OF THE OFFENSE OF ADULTERATING FOOD.

(Commence as in the form on page 35) that C. D., on, etc., at, etc., in the said county, unlawfully and fraudulently did adulterate, for the purpose of sale, a certain quantity of bread intended for food, with a certain poisonous substance called (*insert the name of the substance*), contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 622. Of Liquor. — “Whoever adulterates, for the purpose of sale, any liquor used or intended for drink, with cocculus-indicus, vitriol, grains of paradise, opium, alum, capsicum, copperas, laurel water, logwood, Brazil-wood, cochineal, sugar of lead, or any other substance which is poisonous or injurious to health, and whoever sells or offers, or keeps for sale any such liquor so adulterated,—shall be confined in the county jail not exceeding one year, or fined not exceeding one thousand dollars, or both.”²

STATEMENT OF THE OFFENSE OF ADULTERATING LIQUORS.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, unlawfully did adulterate for the purpose of sale, a certain kind of liquor called brandy, then and there intended for drink of persons, with cocculus-indicus, a substance which was then and there poisonous and injurious to health, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

¹ R. S., 353, § 7.

² Id., § 8.

§ 623. **Of Milk.** — “Whoever adulterates, for the purpose of sale, any milk with water, chalk or other substance, or knowingly sells any such adulterated milk, shall be confined in the county jail not exceeding one year, or fined not exceeding five hundred dollars.”¹

STATEMENT OF THE OFFENSE OF ADULTERATING MILK.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, unlawfully did adulterate, for the purpose of sale, five quarts of milk with water, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 624. **Of Medicine.** — “Whoever fraudulently adulterates, for the purpose of sale, any drug or medicine, or sells or offers, or keeps for sale any fraudulently adulterated drug or medicine, knowing the same to be adulterated, shall be confined in the county jail not exceeding one year, or fined not exceeding one thousand dollars, and such adulterated drugs and medicines shall be forfeited and destroyed.”²

STATEMENT OF THE OFFENSE OF ADULTERATING MEDICINES.

(*Commence as in form on page 35*). that C. D., on, etc., at, etc., in the said county, fraudulently did adulterate, for the purpose of sale, a certain drug called quinine, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

2. ADULTERY.

§ 625. **Provisions of the Statute.** — “If any man and woman shall live together in an open state of adultery, or fornication, or adultery and fornication, every such person shall be fined not exceeding five hundred dollars, or confined in the county jail not exceeding one year. For the second offense, such man or woman shall be severally punished twice as much as the former punishment, and for a third offense, treble, and thus increasing the punishment for each succeeding offense; *Provided, however*, that it shall be in the power of the party or

¹ R. S., 353, § 9; Com. v. Haynes, 107 Mass., 194.

² R. S., 353, § 10.

parties offending to prevent or suspend the prosecution by their intermarriage, if such marriage can be legally solemnized, and upon the payment of the costs of such prosecution."¹

§ 626. **Proof.** — "The offense of adultery shall be sufficiently proved by circumstances which raise the presumption of cohabitation and unlawful intimacy."²

STATEMENT OF THE OFFENSE OF ADULTERY AND FORNICATION.

Commence as in form on page 35) that C. D., on the — day of —, A. D., 18—, and on divers other days and times, as well before as after that day, at, etc., in the said county, at the times aforesaid, being a married (or "*single*") man having a lawful wife then living, and E. F.³ at the times aforesaid being a married (or "*single*") woman, having a lawful husband then living, and at all of the said times not being married to each other,⁴ unlawfully and wrongfully did live together in an open state of adultery,⁵ (or "*fornication*" or "*adultery and fornication*"), contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

¹ R. S., 563 § 11. As to the construction of the statute of Iowa, see *State v. Dingee*, 17 Iowa, 232; *State v. Roth*, 17 Iowa, 336. At common law neither adultery nor fornication was indictable. Barb. Cr. L., 222; *State v. Moore*, 1 Swan Tenn., 136; *State v. Smith*, 32 Texas, 167; *Anderson v. Com.*, 6 Rand., 627; *State v. Brunson*, 2 Bailey, 149; *Com. v. Isaacks*, 5 Rand., 634.

² R. S., 354, § 12; *Baker v. U. S.*, 1 Pin. Wis., 641; *State v. Tully*, 18 Iowa, 88.

³ Where the indictment alleged that the adultery was committed with "Adaline Winders," and the proofs showed that it was committed with "Mary Adaline Winders," the variance was held to be fatal. *State v. Dudley*, Wis., 664; *State v. Krisher*, 24 Wis., 64; *State v. Kube*, 20 Wis., 217.

⁴ An allegation that the parties were not married to each other is indispensable. *Moore v. Com.*, 6 Met., 643; *State v. Clinch*, 8 Iowa, 401.

⁵ Criminal intercourse between an unmarried person and another unmarried person of the opposite sex is fornication. *Com. v. Putnam*, 1 Pick., 136. If only one of the parties is married, the act of sexual intercourse between them is adultery in the one married and fornication in the other. *Miner v. People*, 58 Ills., 59; *Hull v. Hull*, 2 Strob. Eq., 174; *State v. Wallace*, 9 N. H., 515; *Hunter v. United States*, 1 Pin., 91; *Com. v. Call*, 21 Pick., 509; but since each is an accessory to the offense of the other, it is presumed that the married person may be convicted of fornication and the unmarried person of adultery; R. S., 393, §§ 274, 275; *State v. Pearce*, 2 Blackf., 318; *State v. Henton*, 6 Ala., 864; *State v. Wallace*, 9 N. H., 518; *Warden v. State*, 18 Ga., 264; *contra*, *Resp v. Roberts*, 2 Dall., 124; *Com. v. Wentz*, 1 Ashm., 260. Criminal intercourse between two persons, if both are married, is adultery in both. *Hinton v. United States*, 1 Pin. Wis., 91.

§ 627. **Evidence.** — In order to constitute the crime of adultery or fornication the parties must dwell together openly and notoriously. Circumstances, to raise the presumption of unlawful intimacy, should amount to enough to produce a belief or conviction of the judgment that the parties have been in the habit of having illicit intercourse with each other as if the relation of husband and wife existed; one sexual intercourse is not sufficient to complete the offense.¹ In order to sustain the charge of adultery there must be proof of actual marriage.² This may be shown by the admissions of the defendant.³ Reputation is not sufficient. On the trial of such charge, the husband is not a competent witness for or against the wife,⁴ but he is a competent witness against the person who is alleged to have committed adultery with her.⁵ On the trial of an indictment of two persons for living in an open state of adultery with each other, a witness may testify that in passing through the room where the defendants were he heard one of them in speaking to the other admit the adultery, although he did not hear the rest of their conversation.⁶

3. BIGAMY.

§ 628. **Definition and Punishment.** — “Whoever, having a former husband or wife living, marries another person, or continues to cohabit with such second husband or wife in this state, shall be deemed guilty of bigamy, and be imprisoned in the penitentiary not less than one nor more than five years, and fined not exceeding one thousand dollars: *Provided*, nothing herein contained shall extend to any person whose husband or wife shall have been continually absent from such

¹ *Searls v. People*, 13 Ill., 597; *Miner v. People*, 58 Ill., 60; *Baker v. U. S.*, 1 Pin. Wis., 641.

² *Miner v. People*, 58 Ill., 60; *Smitherman v. State*, 27 Ala., 23; *State v. Wilson*, 22 Iowa, 364; *State v. Sanders*, 30 Iowa, 582.

³ *State v. Sanders*, 30 Iowa, 582.

⁴ *Miner v. People*, 58 Ill., 60; *Harmon v. Harmon*, 16 Ill., 85; *contra*, *State v. Bennett*, 31 Iowa, 24.

⁵ *State v. Dudley*, 7 Wis., 664.

⁶ *Com. v. Pitsinger*, 110 Mass., 101.

person for the space of five years together, prior to the said second marriage, and he or she not knowing such husband or wife to be living within that time. Also, nothing herein contained shall extend to any person that is, or shall be at the time of such second marriage, divorced by lawful authority from the bands of such former marriage, or to any person where the former marriage hath been by lawful authority declared void."¹

§ 629. **Proof and Venue.** — "It shall not be necessary to prove either of the marriages by register or certificate thereof, or other record evidence; but the same may be proved by such evidence as is admissible to prove a marriage in other cases. The offense may be alleged to have been committed, and the trial may take place in the county where cohabitation shall have occurred."²

§ 630. **Marrying a Bigamist.** — "If any man or woman being unmarried shall knowingly marry the husband or wife of another, or continue to cohabit with such husband or wife in this state, such man or woman shall be fined not more than five hundred dollars, or confined in the county jail not exceeding one year, or both, in the discretion of the court."³

STATEMENT OF THE OFFENSE OF BIGAMY.⁴

(Commence as in form on page 35) That C. D., on the — day of — A. D. 18—, at the town of —, in the county of —, and state of —, did lawfully marry one E. F.; and that the said C. D. afterwards, while having the said E. F. for his wife, and during her life, *to wit*., on the

¹ R. S., 355, § 28.

² Id., 356, § 29.

³ Id., § 30.

⁴ For another form, see *Jackson v. People*, 2 Scam., 232; *Com. v. Godsoe*, 105 Mass., 464.

⁵ An indictment need not state when or where the first marriage took place. *State v. Bray*, 13 Ired., 289; *contra*, *State v. Labore*, 26 Vt., 765; nor that it subsisted at the time of the second marriage, if it alleges that the first wife was then alive. *State v. Norman*, 2 Dev., 222.

— day of —, A. D. 18—, at, etc., in said county, feloniously¹ did marry² one G. H.,³ the said E. F., his former wife, being⁴ then, at the time last aforesaid, alive,⁵ contrary to the form of the statute in such case made and provided⁶ (*conclude as in form on page 35*).⁷

STATEMENT OF THE OFFENSE OF KNOWINGLY MARRYING THE WIFE OF ANOTHER.

(*Commence as in form on page 35*) that C. D., on etc., at, etc., in the said county, then and there being unmarried, unlawfully, knowingly, and feloniously did marry one E. F., the said E. F. then and there being the wife of G. H., as the said C. D. then and there well knew, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 631. Evidence.—The Prosecutor must Prove the First and Second Marriages, and that at the time of the Second Marriage the former Husband or Wife was Alive.⁸ The statute makes the certificate of the officer performing the ceremony filed with

¹ The word feloniously is usually inserted. 3 Chitty Cr. L., 719; Jackson v. People, 2 Scam., 232.

² Where the second marriage took place out of the state, cohabitation in the state and county in which the trial is had after such second marriage, and that such second marriage was unlawful where it took place, must be alleged and proved. State v. Palmer, 18 Vt., 570; 1 Camp., 61; People v. Lambert, 5 Mich., 349; Rex. v. Fraser, 2 Russ. & M., 407; otherwise the prisoner must be acquitted. People v. Mosher, 2 Park. Cr. C., 195; State v. Palmer, 18 Vt., 570. And where the first marriage was celebrated abroad, the prosecution must show not only the marriage in fact, but a marriage valid by the foreign law. People v. Lambert, 5 Mich., 349.

³ The omission of the middle letter of the name, is not a defect. State v. Williams, 20 Iowa, 98; State v. Thompson, 19 Iowa, 298; Moore's Civil Pr., page 436, note 3.

⁴ The word "being" generally, unless connected with some other matter, will relate to the time of the indictment, rather than to the time of the commission of the offense. 1 Bish., Cr. P., § 410.

⁵ It is not necessary to negative the proviso in the statute. State v. Abbey, 29 Vt., 60; Lequat v. People, 11 Ills., 330; Metzker v. People, 14 Ills., 102; State v. Williams, 20 Iowa, 98.

⁶ Bigamy is an offense created by statute. 1 Bish., Cr. L., § 512; therefore an indictment should conclude against the form of the statute, *ante*, page 37.

⁷ An indictment following substantially the words of our statute was held sufficient in Com. v. Whaley, 5 Bush, Ky., 266.

⁸ Barb. Cr. L., 213; Conant v. Griffin, 48 Ill., 415; Shafer v. Ohio, 20 Ohio, 3; Weinberg v. State, 25 Wis., 370.

the county clerk or a certified copy of the registry evidence of the marriage of the parties.¹ Such certificate should be accompanied with the proof of the identity and probably of the official character of the celebrator.² It is sufficient to show that a marriage was in fact celebrated according to the law of the country in which it took place, even though it was voidable if it was not absolutely void.³ This may be shown by any person present at the marriage without proof of any license or other record evidence.⁴ Proof by a clergyman that he married a person by the same name as the alleged parties to the first marriage is not sufficient without some additional evidence that the prisoner was one of the parties married.⁵ But if the clergyman testifies that he believes the prisoner to be the person he married it will be sufficient.⁶ Neither marriage can be sufficiently proved by reputation alone;⁷ but either marriage may be proved by the deliberate admissions of the accused himself.⁸

§ 632. When Husband or Wife may be a Witness — Effect of the Absence of — Evidence of being Alive. — If it is clearly proved that the prisoner had another husband or wife at the time of the

¹ R. S., 695, § 12.

² 3 Greenl. Ev., § 204.

³ 3 Inst., 88, Stark. Ev., 1185; 3 Greenl. Ev., § 204; *State v. Barefoot*, 2 Rich, 209; *Weinberg v. State*, 25 Wis., 370.

⁴ R. S., 356, § 29, *ante* § 629; *Jackson v. People*, 2 Scam., 231; *Rex v. Alison*, Russ. & Ry., 109; 2 Arch. C. P. & Pl., 1029; *Moore's Case*, 9 Leigh, 639; *State v. Kean*, 10 N. H., 347; *Wolverton v. Ohio*, 16 Ohio, 176; *Warner v. Com.*, 2 Va. Cas., 95; *Com. v. Putnam*, 1 Pick., 136; *State v. Williams*, 20 Iowa, 98; *State v. Wilson*, 22 Iowa, 364.

⁵ *People v. Steer*, 2 City H. Rec., 111.

⁶ *People v. Whigham*, 1 Wheeler C. C., 115.

⁷ *Harman v. Harman*, 16 Ill., 85; *Miner v. People*, 58 Ill., 60; *Myatt v. Myatt*, 44 Ill., 473.

⁸ R. S., 356, § 29, *ante* § 629, 3 Greenl. Ev., § 204; *Harmon v. Harmon*, 16, Ill., 85; *Miner v. People*, 58 Ill., 60; *Woolverton v. State*, 16 Ohio, 173; *Weinberg v. State*, 25 Wis., 370; *Fenton v. Reed*, 4 John., 52; *State v. Sanders*, 30 Iowa, 582; *State v. Ham.*, 11 Me., 391; *Ceyford's Case*, 7 Greenl., 57; *Rex v. Summons*, 1 Car. & R., 167; *contra*, *Gahan v. People*, 1 Park. C. R., 378; *Clayton v. Wardell*, 4 Com., 230; *People v. Humphrey*, 7 John., 314; *Com. v. Littlejohn*, 15 Mass., 163; *State v. Russell*, 6 Conn., 446; *Kebly v. Rucker*, 1 A. K. Marsh, 290.

second marriage, since such second marriage is void, the second wife or husband is admissible as a witness either for or against the prisoner to prove the second marriage or any other fact material to the issue, except a fact showing the first marriage was void, or that the first wife or husband was dead at the time of the second marriage.¹ But the first wife or husband is not admissible as a witness for any purpose.² The mere presumption of the continuance of life is not sufficient to show that the first husband or wife was living at the time of the second marriage, without the aid of other circumstances, though five years has not elapsed since the last intelligence was had in regard to the absent person.³ But a letter received from abroad in her or his hand-writing is evidence of the party being alive at the time the letter appears to have been written.⁴ The marrying a second time during the life of the first husband or wife is punishable, though the former partner has voluntarily withdrawn and remained absent and unheard of for any term of time less than the period limited by the statute, though the person offending honestly believed at the time of the second marriage that the first husband or wife was dead.⁵

§ 633. **Defense.** — The accused may show in his defense the continued absence of the former partner for the space of five years together, prior to the second marriage, and that he or she did not know the former husband or wife to be living within that time,⁶ that the first marriage was void by reason of consanguinity or otherwise,⁷ or that he had been divorced by lawful authority.⁸ It has been held in another state in a civil action, that a divorce procured by the husband

¹ Barb. Cr. L., 214; 3 Greenl. Ev., § 206; *State v. Patterson*, 2 Ired., 346.

² 2 Arch. C. P. & Pl., 1029.

³ *Rex v. Twynning*, 2 B. & Ald., 386.

⁴ 2 Arch. C. P. & Pl., 1029; *Reed v. Noman*, 8 Car. & P., 65

⁵ *Com. v. Marsh*, 7 Met., 472; see *Com. v. Hunt*, 4 Cush., 49

⁶ R. S., 356, § 28; *ante* § 628; *Reg v. Jones*, 1 C. & M., 614.

⁷ *Conant v. Griffin*, 48 Ills., 410; *Madison's Case*, 1 Hale P. C., 693; *Shaffer v. State*, 20 Ohio, 1; *People v. Mosher*, 2 Park. Cr. R., 195; but see *State v. Palmer*, 18 Vt., 570.

⁸ R. S., 356, § 23, *ante* § 628.

in one state while the wife was living in another, without her being personally notified or apprised of the proceedings, was absolutely void.¹ If the rule is the same in criminal prosecutions, it would seem to follow that such a divorce is no defense to an indictment for bigamy.² A divorce obtained after the second marriage from the first is no defense to an indictment for bigamy.³ When a divorce has been granted for the offense of one of the parties, probably the guilty party is "divorced by lawful authority" within the meaning of the statute so that such party can marry again without being guilty of bigamy or adultery, though such person may truthfully be said to have a former husband or wife living.⁴

4. CIRCULATING OBSCENE BOOKS, ETC.

§ 634. Provisions of the Statute. — "Whoever brings, or causes to be brought into this state, for sale or exhibition, or shall sell or offer to sell, or shall give away or offer to give away, or have in his possession, with or without intent to sell or give away, any obscene and indecent book, pamphlet, paper, drawing, lithograph, engraving, daguerreotype, photograph, stereoscopic picture, model cast, instrument, or article of indecent or immoral use, or shall advertise the same for sale, or write or cause to be written, or print or cause to be printed, any circular, hand-bill, card, book, pamphlet, advertisement, or notice of any kind, or shall give information orally, stating when, how, or of whom, or by what means any of the said indecent and obscene articles and things hereinbefore mentioned can be purchased or otherwise obtained, or shall manufacture, draw and expose, or draw with intent to sell or

¹ *Borden v. Finch*, 15 John., 121; *Bradshaw v. Heath*, 13 Wen., 407; *Pawling v. Bird*, 13 John., 192; *Dows v. Cobb*, 12 Barb., 640; *Hanover v. Turner*, 14 Mass., 227; see also *Brineler v. Dawson*, 4 Scam., 541; *Welch v. Sykes*, 3 Gilm., 199; *Thompson v. Emmet*, 15 Ills., 415; *Sim v. Frank*, 25 Ills., 125.

² 3 Chitty Cr. L., 718, *n. d.*

³ *Baker v. People*, 2 Hill, 325.

⁴ *People v. Hovey*, 5 Barb., 117; *Com. v. Putnam*, 1 Pick., 36; *State v. Weatherby*, 43 Me., 258.

to have sold, or print any such articles, shall be confined in the county jail not more than six months, or be fined not less than one hundred nor more than one thousand dollars for each offense—one-half of the said fine to be paid to the informer, upon whose evidence the person so offending shall be convicted, and one-half to the school fund of the county in which said conviction is obtained.”¹

STATEMENT OF THE OFFENSE OF SELLING AN OBSCENE BOOK.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, unlawfully did sell a certain obscene and indecent book, contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

5. CURRENCY UNAUTHORIZED.

§ 635. Issuing or Uttering.—“Whoever issues or passes any note, bill, order or check, other than foreign bills of exchange, the notes or bills of the United States, or of some bank incorporated by the laws of this state or of the United States, or of some one of the United States, or by the laws of either of the British provinces in North America, with intent that the same shall circulate as currency, shall be fined not less than one hundred nor more than one thousand dollars for each offense, and shall not be permitted to collect any demand arising therefrom.”²

STATEMENT OF THE OFFENSE OF ISSUING A NOTE INTENDED TO BE CIRCULATED AS CURRENCY.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, unlawfully did issue and deliver to one E. F., a certain promissory note of the denomination of ten dollars, and for the payment of ten dollars by the said C. D., to the bearer on demand, with intent that the same should be circulated as currency, contrary to the form of the statute in such case made and provided (conclude as in the form on page 35).

¹ R. S., 386, § 223, see ante § 301.

² R. S., 360, § 54.

6. GAMING HOUSES.

§ 636. Provisions of the Statute. — "Whoever keeps a common gaming-house, or in any building, booth, yard, garden, boat or float, by him or his agent used and occupied, procures or permits any persons to frequent or come together to play for money or other valuable thing, at any game, or keeps or suffers to be kept any tables or other apparatus, for the purpose of playing at any game or sport, for money or any other valuable thing, or knowingly rents any such place for such purposes, shall upon conviction, for the first offense be fined not less than one hundred dollars, and for the second offense be fined not less than five hundred dollars, and be confined in the county jail not less than six months, and for the third offense shall be fined not less than five hundred dollars, and be imprisoned in the penitentiary not less than two years nor more than five years."¹

STATEMENT OF THE OFFENSE OF KEEPING A COMMON GAMING HOUSE.²

(Commence as in form on page 35) that C. D., on the — day of —, A. D. 18—, and on divers other days and times,³ as well before as afterwards,⁴ at, etc., in said county,⁵ unlawfully did keep a common gaming

¹ R. S., 371, § 127. Keeping of a gaming house was indictable at common law. *Rex v. Dixon*, 10 Mod., 335; *People v. Jackson*, 3 Denio, 101; *U. S. v. Dixon*, 4 Crauch, C. C., 107; *Com. v. Tilton*, 8 Met., 232.

² For other forms held sufficient, see *State v. Maurer*, 7 Iowa, 407; *State v. Middleton*, 11 Iowa, 246; *State v. Cure*, 11 Iowa, 479.

³ This is a continuing and indivisible offense, so that but one penalty can be assessed for keeping such house prior to the commencement of the prosecution. *State v. Lindsley*, 14 Ind., 430.

⁴ This is sufficiently certain as to the time. *Stoltz v. People*, 4 Scam., 168; *State v. Prescott*, 33 N. H., 212. And it has been held to be sufficient to allege that the house was kept for a single day. *State v. Crogan*, 8 Iowa, 523; *State v. Cure*, 7 Iowa, 479.

⁵ It is sufficient to allege that the gaming house was kept in the county; yet if it is alleged that the building is situate on a particular lot, the proof must sustain the allegation. *State v. Crogan*, 8 Iowa, 523.

house,¹ there situate, then on the said days and times, occupied by the said C. D.,² and then on said days and times, and there in the said house, for his gain and profit,³ unlawfully did procure and permit divers persons⁴ to frequent and come together to play for a certain valuable thing, *to wit.*, (*insert particular description of the thing*) (or "for money"⁵) at the unlawful game of billiards,⁷ and then, on the said days and times, and there the said C. D. did unlawfully procure and permit⁶ the said persons to remain

¹ It has been said to be sufficient to allege that the defendant, on, etc., at etc., unlawfully did keep a common gaming house, without adding anything further, which is probably correct, so far as it relates to the first clause of our statute. *Rex v. Taylor*, 3 B. & C., 502; *Com. v. Pray*, 13 Pick., 359; *State v. Miller*, 5 Blackf., 502; *Rex v. Dixon*, 10 Mod., 335; *Rex v. Mason*, 1 Leach, 487; 2 Hawks P. C. C., 25, § 57; and see *Com. v. Crupper*, 3 Dana, 466; *Com. v. Stahl*, 7 Allen, 304; *contra*, *Vandeworker v. State*, 13 Ark., 700, 701; *People v. Jackson*, 3 Denio, 101; 2 Whart. Cr. L., § 2446; 2 Bish. Cr. P., § 275. It will be sufficient to set out the offense in the language of the statute. *State v. Kesslering*, 12 Mo., 565; *State v. Austin*, 12 Mo., 576; *State v. Price*, 12 Gill & J., 260.

² An allegation that the defendant kept the gaming house is a sufficient allegation that he occupied it. *Stoltz v. People*, 4 Scam, 169.

³ The words "for his gain and profit," or "for his gain and lucre," or "for his gain," are unnecessary, *State v. Williams*; 1 Vroom, 102; *State v. Bertheol*, 6 Blackf., 474; and therefore mere surplusage; *State v. Bailey*, 1 Fost. N. H., 343.

⁴ It is not necessary to state the names of the persons who played. *Green v. People*, 21 Illinois, 125; *State v. Prescott*, 33 New Hampshire, 212; *Carpenter v. State*, 14 Ind., 109; *Dormer v. State*, 2 Ind., 308; *Horan v. State*, 24 Texas, 161; *Com. v. Lampton*, 4 Bibb, 461; *State v. McBride*, 8 Humph., 66. But there are authorities holding that the names of the players must be stated if known, and if not known it must be so alleged. *Sowle v. State*, 11 Ind., 492; *Winnemiller v. State*, 11 Ind., 516; *Ball v. State*, 11 Ind., 492; *Davis v. State*, 7 Ohio, 204; *Butler v. State*, 5 Blackf., 280.

⁵ It has been held that the particular thing played for must be stated, and that the words of the statute, "valuable thing," were not sufficiently certain. *Anthony v. State*, 4 Humph., 83; *contra*, *Bagley v. State*, 1 Humph., 486.

⁶ It is not necessary to state how much money was lost or who lost it. *Montee v. Com.*, 3 J. J., 132; *Dean v. Tennessee*, Mart. & Yerg., 127; *State v. McBride*, 8 Humph., 66.

⁷ It is not necessary to state the name of the game played. *State v. Dole*, 3 Blackf., 294; *State v. Ake*, 9 Texas, 322; *Montee v. Com.*, 3 J. J. Marsh., 132; *Dean v. Tennessee*, Mart. & Yerg., 127; *State v. McBride*, 8 Humph., 66.

⁸ It is necessary to allege by whose permission the gambling was done. An allegation that the defendant kept the house in which unlawful games were played, is not sufficient. *Com. v. Crupper*, 3 Dana, 466; *contra*, *State v. Ellis*, 4 Mo., 474.

together in the said house, playing for the said valuable thing (*or money*), at the said game, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 637. Evidence — 1. Proof that the Defendant Kept a Gaming House, or Procured or Permitted Gaming in a Building used and Occupied by him or his Agent, is Indispensable. — Positive evidence that the defendant occupied the house is unnecessary. It may be proved by circumstances.¹ A person may own and control a house or place resorted to for gaming without having any knowledge that it is resorted to for that purpose, and he is not in such case the keeper of a gaming-house within the meaning of the statute.² To constitute a common gaming-house, it is not necessary that all persons should have access to it; if it is open to persons generally, that is sufficient.³ A person occupying one room only of a house and keeping a faro bank for public resort therein keeps a gaming-house in the sense of the law.⁴ It is not necessary that the house should be kept for gain,⁵ nor that the defendant should own the building.⁶ When the defendant opens his house for the purpose of gambling for money or other valuable things, he keeps a gaming-house though only one or two games have been played there. And it is a question of fact, to be determined by the jury from the evidence, whether he has actually opened his house for this purpose.⁷

§ 638. 2. The Place must be Kept to Game in for Money or Other Valuable Things. — The keeping of a house for games of chance, conducted for recreation merely, is not criminal.⁸ And it has been held that the keeping of a billiard saloon where persons assemble to play the game of billiards for amusement, even though they bet on the game so far as to determine which of

¹ State v. Worth, R. M. Charlton Rep., 5.

² State v. Currier, 23 Me., 45; State v. Cooster, 10 Iowa., 455.

³ Rice v. State, 10 Texas, 545; Lockhart v. State, 10 Texas, 275.

⁴ Com. v. Hyde, Thatch. C. C., 19.

⁵ Rex v. Medlor, 2 Shaw, 36; State v. Lyman, 5 Harring., 510.

⁶ State v. Haines, 30 Me., 65; State v. Currier, 23 Me., 43; Stevens v. People, 67 Ills., 587.

⁷ Armstrong v. State, 4 Blackf., 247; State v. Cooster, 10 Iowa, 455.

⁸ People v. Sergeant, 8 Cowen, 140.

the contesting parties shall pay for the use of the table, does not render the house a common gaming-house within the statute;¹ but playing for the drinks around, with the knowledge and permission of the owner, does make him liable for keeping a gaming-house.²

7. GAMING IN A TAVERN.

§ 639. Provisions of the Statute. — “Every tavern-keeper, common victualer or other person, keeping or suffering to be kept, in any place occupied by him, any implements³ such as are used in gaming, in order that the same may, for hire, gain or reward, be used for the purpose of amusement, who suffers any implement of that kind to be used upon any part of his premises, for the purpose of gaming for money or other property, or who suffers any person to play at an unlawful game or sport therein,⁴ shall for the first offense be fined one hundred dollars, and for the second offense be fined not less than five hundred dollars and be confined in the county jail not less than six months, and for the third offense shall be fined not less than five hundred dollars and be imprisoned in the penitentiary not less than two nor more than five years, and in either case he shall forfeit his license, and shall not again be licensed as a tavern-keeper for one year from his conviction.”⁵

¹ *Harrbaugh v. People*, 40 Ills., 294.

² *State v. Leicht*, 17 Iowa, 29.

³ Game cocks are not implements used in gaming within the meaning of the statute. *Cooladge v. Choate*, 11 Met., 79.

⁴ The playing within a store-house leased to the defendant with the tavern but not within the curtilage of the tavern, nor used in any way with it, is not within the statute prohibiting gaming in a tavern. *Com. v. Sanders*, 5 Leigh, 571.

⁵ R. S., 371, § 128.

STATEMENT OF THE OFFENSE OF SUFFERING PERSONS TO PLAY UNLAWFUL GAMES IN A TAVERN.

(Commence as in form on page 35) that C. D., on, etc, at, etc., in the said county, then and there being a tavern-keeper, unlawfully did¹ suffer² and permit divers,³ persons to play for money certain unlawful games with cards⁴ in his tavern, then and there kept and occupied by him,⁵ contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

8. GAMING DECOYS.

§ 640. Provisions of the Statute. — “If any one shall, through invitation or device, prevail on any person to visit any room, building, booth, yard, garden, boat or float, kept for the purpose of gambling, or prostitution, or fornication, he shall, on conviction thereof, for the first offense be fined not less than ten nor more than one hundred dollars, and for the second offense he may be fined not less than one hundred dollars, nor more than three hundred dollars, or may be confined in the county jail not exceeding six months, or both, in the discretion of the court.”⁶

¹ The allegations “did for game permit persons to come together to play at a game for money, at and in a house then and there kept by him,” *Stoltz v. People*, 4 Scam., 168; and “being a tavern-keeper duly licensed,” permitted persons “to play the game of cards in his said dwelling-house where he was then and there licensed as a tavern-keeper,” were each respectively held sufficient. *Com. v. Arnold*, 4 Pick., 251.

² It is not necessary to allege that the gaming was suffered or permitted for gain. *Com. v. Cotton*, 8 Gray, 488; but see *Rex v. Medler*, 2 Show, 36; *State v. Lyman*, 5 Harring., 510.

³ It is not necessary to state the names of the persons who played. *Green v. People*, 21 Ills., 125; *contra*, *Ball v. State*, 7 Blackf., 242; *Sowle v. State*, 11 Ind., 492; *Davis v. State*, 7 Ohio, 204.

⁴ The words “a certain unlawful game with cards,” are a sufficient description of the game. *Green v. People*, 21 Ills., 125. If the allegation is suffering persons “to play at cards and other unlawful games,” the words “unlawful games” may be rejected as surplusage. *Com. v. Bolkhom*, 3 Pick., 281.

⁵ It should be alleged that the defendant kept or occupied the place where the game was played. *Com. v. Bolkhom*, 3 Pick., 281.

⁶ R. S., 372, § 129.

STATEMENT OF THE OFFENSE OF DECOYING A PERSON INTO A PLACE KEPT
FOR THE PURPOSE OF GAMBLING.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county unlawfully through invitation did prevail upon the said A. B. to visit a certain room there situate, then and there kept for the purpose of gambling, contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

9. GAMBLING IN GRAIN, ETC.

§ 641. Provisions of the Statute. — "Whoever contracts to have or give to himself or another the option to sell or buy, at a future time, any grain or other commodity, stock of any railroad or other company, or gold, or forestalls the market by spreading false rumors to influence the price of commodities therein, or corners the market, or attempts to do so in relation to any of such commodities, shall be fined not less than ten dollars nor more than one thousand dollars, or confined in the county jail not exceeding one year, or both; and all contracts made in violation of this section shall be considered gambling contracts and shall be void."¹

STATEMENT OF THE OFFENSE OF MAKING A CONTRACT TO GIVE TO ANOTHER
AN OPTION TO BUY GRAIN AT A FUTURE TIME.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, unlawfully did contract with one E. F. to give to the said E. F. the option to buy ten thousand bushels of wheat for the sum of one dollar per bushel at a future time, *to wit.*, on the—day of—A. D., 18—, contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

10. INCEST.

§ 642. Father and Daughter. — "If a father shall rudely and licentiously cohabit with his own daughter, the father shall be imprisoned in the penitentiary for a term not exceeding twenty years."²

¹ R. S., 372, § 130.

² Id., 376, § 156. Independent of the statute incest is not an indictable offense. 4 Black. Com., 64; 1 Bish Cr. L., § 502. A father indicted for rape on the person of his daughter may be convicted of incest. *Com v. Goodhue*, 2 Met., 193.

STATEMENT OF THE OFFENSE OF INCEST OF FATHER WITH DAUGHTER.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, feloniously rudely, licentious and knowingly did¹ cohabit with one E. F., then being as the said C. D. then and there well knew,² his, the said C. D.'s own daughter, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 643. Of Relatives. — "Persons within the degrees of consanguinity, within which marriages are declared by law to be incestuous and void, who shall intermarry with each other or who shall commit adultery or fornication with each other, or who shall lewdly and lasciviously cohabit with each other, shall be imprisoned in the penitentiary not exceeding ten years."³

STATEMENT OF THE OFFENSE OF INCEST OF BROTHER WITH SISTER.

(*Commence as in form on page 35*) that C. D., did on, etc., at, etc., in the said county feloniously, lewdly and lasciviously cohabit with one E. F., then being as the said C. D. then and there well knew,⁴ the said C. D.'s own sister of the whole blood, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 644. Evidence.—Where the prisoner had been guilty of illicit intercourse with a young woman whom he had always recognized as his daughter, and with whose mother he had lived in reputed wedlock, the charge of incest was held to be established.⁵ The admissions of the father that the person with whom he had sexual intercourse was his daughter by a

¹ An indictment which charges that the acts were upon the person of A. B., the said A. B. then and there being the daughter of him, the said C. D., etc., sufficiently avers the relationship between the parties. *Bergen v. People*, 17 Ill., 426.

² An allegation that the defendant knew the relationship is indispensable, the word "unlawfully" not being equivalent to that allegation. *Williams v. State*, 2 Carter, Ind., 439.

³ R. S., 376, § 157. As to the construction of the statute of Iowa, see *State v. Schaunhurst*, 34 Iowa, 547.

⁴ It is sufficient to allege that the defendant knew of the relationship between the guilty parties without alleging that they both knew it. *Morgan v. State*, 11 Ala., 289.

⁵ *Com. v. Bruce*, 6 Penn. Law J., 236.

former wife is competent evidence.¹ But such admissions uncorroborated by any circumstance inspiring belief in its truth arising out of the conduct of the accused are not sufficient to convict.² In New York it was held that a statute which is somewhat similar to ours was only applicable to cases in which the sexual intercourse was by mutual consent, and that if it was accomplished by force it was punishable only as a rape.³

11. PRIZE FIGHTING.

§ 645. **Sending Challenge—Training for.** — “Whoever sends, publishes or causes to be sent or published, or otherwise made known, any challenge to fight what is commonly known as a prize fight, or shall accept any such challenge, or cause the same to be accepted, or goes into training preparatory to such fight, or acts as trainer for any person contemplating any participation in such fight, or witnesses such training, or engages as a witness in any such fight, shall be confined in the county jail not exceeding six months, and fined not exceeding five hundred dollars.”⁴

STATEMENT OF THE OFFENSE OF SENDING A CHALLENGE TO FIGHT.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, unlawfully did send to E. F. a challenge to fight what is commonly known as a prize fight by and between him, the said C. D. and the said E. F., contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

§ 646. **Engaging in.** — “Whoever, by previous appointment or arrangement, meets another person and engages in a prize fight, shall be imprisoned in the penitentiary not less than one nor more than ten years.”⁵

¹ *Bergen v. People*, 17 Ills., 426; *People v. Hamden*, 1 Park. Cr. R., 344.

² *Bergen v. People*, 17 Ills., 426; contra, *Morgan v. State*, 11 Ala., 289; *State v. Schaunhurst*, 34 Iowa, 547.

³ *People v. Harriden*, 1 Park. Cr. R., 344.

⁴ R. S., 388, § 231. Prize-fighting was indictable at common-law. *Reg. v. Brown, C. & M.*, 314.

⁵ R. S., 388, § 232.

STATEMENT OF THE OFFENSE OF ENGAGING IN A PRIZE FIGHT.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, by previous appointment, feloniously did meet one E. F., and then and there engage in a fight with him, the said E. F., contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 647. *Aids, Seconds, etc.* — “Whoever is present at such fight as an aid, second, or surgeon, or advises, encourages or promotes such fight, shall be imprisoned in the penitentiary not less than one nor more than five years, or be confined in the county jail not exceeding one year and fined not exceeding one thousand dollars.”¹

STATEMENT OF THE OFFENSE OF AIDING IN A PRIZE FIGHT AS SECOND.

(*Commence as in form on page 35*) that E. F., on, etc., at, etc., in the said county by previous appointment and arrangement, feloniously did meet one G. H., and then and there engage in a fight with the said G. H., and that C. D. was then and there feloniously and willfully present as a second, aiding, encouraging and promoting the said fight, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 648. *Leaving the State to Fight.* — “Whoever, being an inhabitant or resident of this state, by previous appointment or engagement made therein, leaves the state and engages in a fight with another person without the limits thereof, shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding five thousand dollars.”²

STATEMENT OF THE OFFENSE OF LEAVING THE STATE TO FIGHT.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, then and there being an inhabitant and resident of this said State of Illinois, by previous appointment made in the said town and county in this said state, feloniously did leave the said State of Illinois and engage in a fight with one E. F., at — in the county of — and State of Missouri, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

¹ R. S., 388, § 233. At common law all who were present at a prize fight, aiding, assisting or encouraging, were liable as principal actors. *Anon.*, 6 Mod., 43; *Rex v. Perkins*, 4 Car. & P., 537; *State v. Stalcup*, 1 Ired., 30; *People v. Ah. Ping*, 27 Cal., 489; *State v. St. Clair*, 17 Iowa, 149.

² R. S., 388, § 234.

§ 649. **Sparring and Boxing Exhibitions.** — “Whoever instigates, carries on, promotes or engages in as a witness, any sparring or boxing exhibition, shall be fined not exceeding five hundred dollars, or confined in the county jail not exceeding six months.”¹

STATEMENT OF THE OFFENSE OF CARRYING ON A BOXING EXHIBITION.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, unlawfully did carry on a certain boxing exhibition, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 650. **Preventing.** — “Any person who shall, upon complaint made before any judge or justice of the peace, appear to be about to engage in any such fight or sparring or boxing exhibition, may be compelled to enter into bonds with security to keep the peace, as in other cases of threatened breaches of the peace.”²

¹ R. S., 388, § 235.

² Id., § 236.

SECTION VIII.

OFFENSES AGAINST THE PUBLIC JUSTICE.

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1. BRIBERY.

§ 651. **Definition and Punishment.** — “Whoever corruptly, directly or indirectly, gives any money or other bribe, present, reward, promise, contract, obligation or security for the payment of any money, present, reward or any other thing, to any judge, justice of the peace, sheriff, coroner, clerk, constable, jailor, attorney-general, state’s attorney, county attorney, member of the general assembly, or other officer, ministerial or judicial, or to any legislative, executive or other officer of an incorporated city, town or village, or an officer elected or appointed by virtue of any law of this state, after his election or appointment, either before or after he is qualified, with intent to influence his act, vote, opinion, decision or judgment on any matter, question, cause or proceeding which may be then pending, or may by law come or be brought before him in his official capacity, or to cause him to execute any of the powers in him vested, or to perform any duty of him required, with partiality or favor, or otherwise than is required by law,

or in consideration that such officer, being authorized in the line of his duty to contract for any advertising, or for the furnishing of any labor or material, shall directly or indirectly arrange to receive or shall receive, or shall withhold from the parties so contracted with, any portion of the contract price, whether that price be fixed by law or by agreement, or in consideration that such officer hath nominated or appointed any person to any office, or exercised any power in him vested, or performed any duty of him required, with partiality or favor, or otherwise contrary to law, the person so giving and the officer so receiving any money, bribe, present, reward, promise, contract, obligation or security, with intent or for the purpose or consideration aforesaid, shall be deemed guilty of bribery, and shall be punished by confinement in the penitentiary for a term not less than one nor more than five years.”¹

§ 652. **Offering to Give or Receive.** — “Every person who shall offer or attempt to bribe any member of the general assembly, judge, justice of the peace, sheriff, coronor, clerk, constable, jailor, attorney-general, state’s attorney, or other officer, ministerial or judicial, or any legislative, executive or other officer of any incorporated city, town or village, or any officer elected or appointed by virtue of any law of this state, in any of the cases mentioned in the preceding section, and every such officer who shall propose or agree to receive a bribe in any of such cases, shall be fined not exceeding five thousand dollars.”²

§ 653. **Of Judicial Officers.** — “Whoever corrupts, or attempts, directly or indirectly, to corrupt any master in chancery, auditor, juror, arbitrator, umpire or referee, by giving, offering or promising any gift or gratuity whatever with intent to bias the opinion or influence the decision of such master in chancery, auditor, juror, arbitrator, umpire or referee, in relation to any matter pending in the court, or before an inquest, or for the decision of which such arbitrator, umpire or referee has been chosen or appointed, and every such official who receives

¹ R. S., 356, § 31.

² Id., § 32; *Walsh v. People*, 65 Ills., 58.

or offers, or agrees to receive, a bribe in any of the cases above mentioned, shall be imprisoned in the penitentiary not exceeding five years, or fined not exceeding one thousand dollars, and confined in the county jail not exceeding one year.”¹

§ 654. **Of Sheriff, Constable, etc.** — “If a sheriff, constable, or other officer authorized to serve legal process, receives from a defendant, or from any other person, any money or other valuable thing as a consideration, reward or inducement for omitting or delaying to arrest a defendant, or to carry him before a magistrate, or for delaying to take a person to prison, or for postponing the sale of property under an execution, or for omitting or delaying to perform any duty pertaining to his office, he shall be fined not exceeding three hundred dollars, or confined in the county jail not exceeding three months.”²

§ 655. **Witness.** — “Whenever in any investigation before a grand jury, or the trial of any person charged with any offense mentioned in either of the four preceding sections, it shall appear to the court that another person than the one charged is a material and necessary witness in the case, and that his testimony would tend to criminate himself, the court may cause an order to be entered of record that such witness be released from all liability to be prosecuted or punished on account of any matter to which he shall be required to testify, and upon such order being entered, such witness shall be compelled to testify; and if he shall testify, such order shall forever after be a bar to any indictment, information or prosecution against him for such matter. And when such witness is admitted to testify on the trial, and does so testify, the defendant shall also at his own request be deemed a competent witness, but his neglect or refusal to testify shall not create any presumption against him, nor shall the court permit any reference or comment to be made to or upon such neglect or refusal.”³

¹ R. S., 357, § 33.

² Id., § 34.

³ Id., § 35.

STATEMENT OF THE OFFENSE OF BRIBERY.

(Commence as in form on page 35) that on the — day of —, A. D. 18—, at the town of —, in said county, a certain cause in which the said A. B. was plaintiff and C. D. was defendant, was pending,¹ and undetermined before L. M., then and there being a justice of the peace of the said county, duly elected, qualified, commissioned, and sworn, and then and there acting as a justice of the peace in and for the said county; and that the said C. D. then and there feloniously, wickedly, and corruptly did give to the said L. M. the sum of one hundred dollars² in money as a bribe, with intent thereby to influence the said L. M.'s decision on the said cause then and there pending before him as aforesaid, in his official capacity as such justice, in favor of him, the said C. D., contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

§ 656. **What Held to be Bribery.** — It has been held indictable at common law to be concerned either as actor or receiver in bribery or attempt at bribery by giving rewards or making promises in order to procure votes in elections;³ by giving refreshments to voters before they vote to induce them to vote for a particular candidate;⁴ by promising money to a member of a corporation to induce him to vote for mayor;⁵ by one elector agreeing to vote for the favorite candidate of another elector for clerk in consideration that the latter shall vote for the favorite candidate of the former for commissioner;⁶ by giving money to a voter and taking his note at the same time giving a counter-note to deliver up the first note when the elector has voted as required;⁷ by betting with a voter that he

¹ A charge against a judge for receiving a bribe not to forfeit a recognizance must allege that proceedings have been or are to be commenced on the recognizance. *People v. Purley*, 2 Cal., 564. So on a charge against a justice of the peace for bribery in the election of a clerk, it must appear that an election was held, and that a vote was given at such election. *Newell v. Com.*, 2 Wash. C. C., 88.

² It is not necessary to state the amount of money offered or given as a bribe. *Com. v. Chapman*, 1 Va. Cr. Cas., 138.

³ *Rex v. Pitt*, 3 Burr, 1335; *Vaughan's Case*, 4 Burr, 2494; *U. S. v. Norrell Whart. St. Tr.*, 189; *Com. v. Shaver*, 3 Serg. & W., 338; *Rex v. Cupland*, 11 Mod., 387; *Com. v. Shaver*, *Watts & S.*, 338.

⁴ *Hughes v. Marshall*, 2 Tyrw., 134, 5 Car. & P., 151.

⁵ *Rex v. Plympton*, 2 Campb., 229, 2 Ld. Raym., 1377; *Walsh v. People*, 65 Ills., 58.

⁶ *Com. v. Callaghan*, 2 Va. Cas., 460.

⁷ *Sulston v. Norton*, 3 Burr, 1235.

will not vote for a particular person for the purpose of inducing him to vote for such person;¹ and by several persons mutually agreeing to procure for another an appointment to a public office for a sum of money to be divided among them,² and by giving a voter money to go out of town and forbear voting.³ The statute provides for the punishment of all these cases as common-law offenses.⁴ If a voter received from one person a card or token in one room which he presents to another person in another room, and thereupon received the money, it is evidence of the payment of money by the former.⁵

§ 657. *Continued.*—The offense of bribery may be committed by a justice of the peace, even though the case in which the bribe is offered is not yet instituted,⁶ or by giving a sheriff a sum of money to induce him to summon jurors to be nominated by the defendant.⁷ Where a voter received money after an election for having voted for a particular candidate, but no agreement for any such payment was made before the election, he was held not to be guilty of bribery.⁸

§ 658. *Place where Offense was Committed.*—If the offer of a bribe is made by letter through the postoffice, the writer commits a complete offense when he deposits the letter,⁹ as well as at the place where it is received.¹⁰

2. CONSPIRACY.

§ 659. *To Indict*—“If any two or more persons shall conspire or agree, falsely and maliciously, to charge or indict, or cause or procure to be charged or indicted, any person for any criminal offense, each of the persons so offending shall

¹ Roscoe Ev., 327.

² Rex v. Pollman, 2 Camp., 229.

³ Rex v. Isherwood, 2 Keney, 202; Bush v. Ralling, Say., 289.

⁴ R. S., 395, § 292.

⁵ Webb v. Smith, 4 Bing., 373.

⁶ Barefield v. State, 14 Ala., 603.

⁷ Com. v. Chapman, 1 Va. Cas., 138.

⁸ Huntingtower v. Gardener, 1 B. & Cres., 297.

⁹ U. S. v. Worrall, 2 Dall., 384.

¹⁰ 2 Bish. Cr. L., § 88.

be fined not exceeding one thousand dollars, and confined in the county jail not exceeding one year."¹

STATEMENT OF THE OFFENSE OF CONSPIRING TO INDICT ANOTHER.

(Commence as in form on page 35) that C. D. and E. F., on, etc., at, etc., in said county, did unlawfully conspire and agree together, falsely and maliciously, to indict² one G. H. for a criminal offense, *to wit.*, for feloniously stealing, taking and carrying away one lumber wagon of the value of seventy-five dollars, the goods and chattels of the said A. B., the said G. H. then and there being innocent of the said criminal offense,³ as the said C. D. and E. F. then and there well knew, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 660. To Do an Illegal Act—"If any two or more persons conspire or agree together, with the fraudulent or malicious intent, wrongfully and wickedly to injure the person, character, business or property of another, or to obtain money or other property by false pretenses, or to do any illegal act, injurious to the public trade, health, morals, police, or administration of public justice, or to prevent competition in the letting of any contract by the state or the authorities of any county, city, town or village, or to induce any person not to enter into such competition, or to commit any felony, they shall be deemed guilty of a conspiracy; and every such offender, and every person convicted of conspiracy at common law, shall be imprisoned in the penitentiary not exceeding three years, or fined not exceeding one thousand dollars."⁴

¹ R. S., 358, § 45.

² An indictment for conspiracy which charged that the defendant did unlawfully and feloniously conspire to rob and steal, etc., was held not to be open to the objection that it charged more than one offense. *State v. Sterling et al.*, 34 Iowa, 443.

³ It is not necessary to allege that the person conspired against was innocent, or that the defendant knew it. *Johnson v. State*, 2 Dutcher, 313; *Reg. v. Spragg*, 2 Burr, 993; *Reg. v. Best*, 2 Ld. Raym., 1167; 6 Mod., 137.

⁴ R. S., 358, § 46; *Com. v. Walker*, 108 Mass., 309.

STATEMENT OF THE OFFENSE OF A CONSPIRACY TO OBTAIN PROPERTY BY FALSE PRETENSES.¹

(Commence as in form on page 35) that C. D.² and E. F., on, etc., at, etc., in the said county, feloniously, fraudulently and deceitfully did conspire and agree together with the fraudulent and malicious intent then and there feloniously, wrongfully and wickedly to obtain one horse of the value of six hundred dollars, the property of the said A. B.³ from the said A. B. by false pretenses,⁴ and to cheat and defraud the said A. B. of the same, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 661. What an Indictable Conspiracy.— At common law a conspiracy is defined to be a confederacy of two or more persons to do an unlawful act or a lawful act by some unlawful

¹ Johnson v. People, 22 Ills., 315. For another form, see Smith v. People, 25 Ills., 17.

² The allegation "C. D. with divers other persons to the jurors unknown" is sufficient. Reg. v. Steel, R. & M., 337; 2 Moody, 246, even though the names of the conspirators were actually known to the jury; People v. Mather, 4 Wen., 229, § 265.

³ The name of the person to be cheated must be stated or some legal excuse given for not doing so. Reg. v. King, 7 Q. B., 782, 807; Reg. v. Peck, 9 Ad. & El., 686; Reg. v. Parker, 3 Q. B., 292, 297. But an indictment may show that the conspiracy was to cheat and defraud the public generally. Com. v. Judd, 2 Mass., 329; Com. v. Harley, 7 Met., 506.

⁴ When the conspiracy is with intent to do a lawful act by unlawful means, the unlawful means intended to be used must be set out as they must be shown to be unlawful. Smith v. People, 25 Ills., 23; State v. Potter, 28 Iowa, 554; State v. Jones, 13 Iowa, 269; People v. Richards, 1 Mich., 216; Ald v. People, 4 Mich., 414; State v. Jones, 13 Iowa, 269; Reg. v. Peck, 9 Ad. & El., 686, 692; State v. Parker, 43 N. H., 83; Com. v. Pruns, 9 Gray, 127; State v. Burnham, 15 N. H., 396; Com. v. Shedd, 7 Cush., 514. But if the intent is to do an unlawful act for which exemplary damage may be recovered by any means, it is not necessary to set out the means to be used. Smith v. People, 25 Ills., 23; Johnson v. People, 22 Ills., 316; Com. v. Hunt, 4 Met., 111; People v. Richards, 1 Mich., 216; State v. Jones, 13 Iowa, 269; State v. Stevens, 30 Iowa, 393; State v. Harris, 38 Iowa, 242; State v. Parker, 43 N. H., 83; *contra*, Lambert v. People, 9 Cowen, 578; State v. Hewet, 31 Me., 396; State v. Roberts, 34 Me., 320; March v. People, 7 Barb., 393; 48 Me., 218. It is sufficient to describe the offense intended to be committed by its name. Com. v. Eastman, 1 Cush., 189; State v. Ripley, 31 Me., 386; Alderman v. People, 4 Mich., 414; but if it is not well known by a name, then its constituents must be mentioned instead. Hartman v. Com., 5 Bar., 60.

means.¹ All the authorities seem to be agreed that all conspiracies to commit a crime are indictable.² But whether a conspiracy to accomplish an unlawful purpose not criminal is indictable or not will depend upon the circumstances of each case.³ A conspiracy to commit a trespass has been held not to be indictable.⁴ But under the present statute a conspiracy to trespass upon real or personal property is indictable.⁵ A conspiracy to seduce a female is indictable.⁶ So the mere combination of individuals to defraud another individual without any consent being established respecting the means to be used for that purpose is punishable as a conspiracy.⁷ So where one to defraud another procured him to bet money on a foot race and then prevailed upon the party to run booty, it was held indictable as a conspiracy.⁸ So to combine to cheat by making one drunk and playing cards with him falsely,⁹ or by representing to a purchaser that a horse offered for sale is the property of a lady deceased and not of a dealer in horses, and is quiet and tractable, all of which at the same time is known to be false, but calculated to effect the sale,¹⁰ or by obtaining on credit goods to come into the hands of one conspirator and be attached by another conspirator for a fictitious claim,¹¹ or by moving, secreting or making conveyance of property for the purpose of keeping it from creditors

¹ *Smith v. People*, 25 Ills., 23; *Com. v. Hunt*, 4 Met., 111; *Lambert v. People*, 9 Cowen, 601; *State v. Mayberry*, 48 Me., 218; *Alderman v. People*, 4 Mich., 414.

² *Smith v. People*, 25 Ills., 23; *Johnson v. People*, 12 Ills., 316; *State v. Buchannan*, 5 Harr. & J., 317.

³ *Smith v. People*, 25 Ills., 24; *Rex v. Warburton*, Law Rep., 1 C. C., 274, 276.

⁴ *Rex v. Turner*, 13 East, 238.

⁵ R. S., 358, § 46; *ante* § 560; *State v. Fisher*, 1 Dev., 504.

⁶ *Smith v. People*, 25 Ills., 23.

⁷ 2 Bish. Cr. L., § 199.

⁸ *Reg. v. Orbell*, 6 Mod., 42.

⁹ *State v. Younger*, 1 Dev., 357.

¹⁰ *Reg. v. Kenrick*, 5 Q. B., 49, Dav. & M., 208.

¹¹ *Reg. v. King*, Dav. & M., 741; *Com. v. Eastman*, 1 Cush., 189.

to defraud them of their dues,¹ or by fabricating shares in addition to the limited number in a joint stock company, even though there is an imperfection in the original formation of the company,² is, like many other similar conspiracies, to cheat, indictable at common law. So a conspiracy, among journeymen³ or laborers⁴ to prevent others from laboring upon such terms as they had agreed, was indictable at common law and is now indictable by statute⁵ and considered elsewhere.⁶ So a conspiracy to slander a man by charging him with a criminal offense or with being the father of a bastard child,⁷ or to charge another with fornication,⁸ or to hiss an actor or damage a piece,⁹ or to induce a young female by false representations to leave the protection of the parents' house with a view to facilitate her prostitution,¹⁰ or to destroy the reputation of an individual by verbal slander,¹¹ is indictable. Likewise indictable conspiracy occurs when there is a confederacy to defraud an incorporated bank of issue whereby its bills in circulation among the public become liable to depreciation or to be made worthless,¹² or where a number of men go to a public auction on the mutual understanding that one only shall bid for any particular article and after the auction is over they shall resell among themselves alone at fair prices the articles bought,

¹ *State v. Simons*, 4 Strob., 266; *Bean v. Bean*, 12 Mass., 21; *Reg. v. Peck*, 9 Ad. & El., 686; *Johnson v. Davis*, 7 Texas, 173; *Whitman v. Spencer*, 2 R. I., 124; *Hall v. Eaton*, 25 Vt., 458.

² *Rex v. Mott*, 2 Car. & P., 521.

³ *Rex v. Bykes*, 1 Moody & R., 179; *Rex v. Tailors, etc.*, 8 Mod., 11; *Com. v. Hunt*, 4 Met., 111; *People v. Fisher*, 14 Wen., 9.

⁴ *Com. v. Hunt*, 4 Met., 111; *People v. Fisher*, 14 Wen., 19.

⁵ R. S., 376, §§ 158, 159; 16, *ante* § 258.

⁶ *Ante* § 258.

⁷ *Child v. North*, 1 Keib, 203; *Reg. v. Best*, 2 Ld. Raym., 1168; *Lambert v. People*, 9 Cowen, 599.

⁸ *Child v. North*, 1 Keb., 254.

⁹ *Clifford v. Brandon*, 2 Campb., 358; *Anon.*, 6 T. R., 628.

¹⁰ *Com. v. Hunt*, 4 Met., 111; *Com. v. Ward*, 1 Mass., 473; *Rex v. Gray*, 3 Harg. St. Tr., 519.

¹¹ 2 Bish. Cr. P., § 215.

¹² *State v. Norton*, 3 Zab., 33.

sharing the difference between the buying and selling prices.¹ So a conspiracy to obtain choses in action,² goods and chattels³ or the ownership or possession of real estate,⁴ or to injure the trade of a card-maker, by bribing his servant to mix grease with the paste used in the manufacture of the article,⁵ or to fabricate or suppress testimony in a court of justice,⁶ or to procure process against one for the purpose of oppression or for private ends,⁷ or to obtain goods by false pretenses,⁸ is an indictable offense.

§ 662. **Who Liable as a Conspirator.** — The prosecutor and all other persons concerned may be indicted for a conspiracy to procure criminal process for improper purposes, and if it appears that the officer executing the process was a party to the conspiracy, the writ can afford him no protection.⁹

§ 663. **The Number of Conspirators Required — Husband and Wife.** — A conspiracy cannot be committed by one alone;¹⁰ nor by a husband and wife alone, they being regarded legally as one,¹¹ unless entered into before their marriage.¹² But the wife may be joined with the husband if there is also another conspirator.¹³ Where two conspirators are charged jointly, no third person being mentioned in the indictment as a co-conspirator, known or unknown, if one of them is acquitted, his acquittal operates as the acquittal of the other.¹⁴ Yet one

¹ *Levi v. Levi*, 6 Car. & P., 239.

² *Lambert v. People*, 9 Cowen, 578.

³ *Sydserrf v. Reg.*, 11 Q. B., 245; *Reg. v. Gompertz*, 9 Q. B., 824.

⁴ *People v. Richards*, 1 Mich., 216; *State v. Shooter*, 8 Rich., 72.

⁵ *Rex v. Cope*, 1 Stra., 144.

⁶ *Rex v. Stevenson*, 2 East, 362; *State v. DeWitt*, 2 Hill S. C., 282; *Rex v. Mawbey*, 6 T. R., 619; *Rex v. Jobson*, 2 Show, 1.

⁷ *Slomer v. People*, 25 Ills., 70.

⁸ *Johnson v. People*, 12 Ills., 314.

⁹ *Slomer v. People*, 25 Ills., 70.

¹⁰ *Com. v. Manson*, 2 Ashm., 31; *Rex v. Hillers*, 2 Chitty, 163; *U. S. v. Cole*, 5 McLean, 513.

¹¹ 1 Hawks P. C., 448, § 8.

¹² *Rex v. Robinson*, 1 Leach, 37.

¹³ *Rex v. Hodson*, 7 Law R., 58; *Rex v. Locker*, 5 Esp., 107; *State v. Covington*, 4 Ala., 603.

¹⁴ *State v. Tom*, 2 Dev., 569; 2 Chitty Cr. L., 1141.

may be convicted after the other is dead,¹ and where there were three conspirators and one died before trial, and another was acquitted, the third was held liable.²

§ 664. **When the Offense of a Conspiracy is Complete.** — In conspiracy the thing intended need not be accomplished; the bare combination or joint design, with the required intent, constitutes the crime.³ No overt acts need be alleged or proved⁴ except for the purpose of showing the combination and the intent. The joint assent to the combination may be proved by circumstantial evidence.⁵

§ 665. **Evidence.** — In a prosecution for conspiracy, the offense may be established by evidence purely circumstantial.⁶

3. ESCAPE.

§ 666. **By Refusal of Officer to Arrest.** — “Every sheriff, jailor, coroner, policeman or other officer, authorized to make arrests, or to have the custody of prisoners, who willfully and corruptly refuses to arrest or confine any person charged with or convicted of any offense, or willfully and corruptly omits or delays to execute any process to him directed, whereby the offender escapes, shall be confined in the county jail not exceeding one year, or fined not exceeding one thousand dollars, or both, and may be removed from his office.”⁷

STATEMENT OF THE OFFENSE OF REFUSING TO EXECUTE A WARRANT.

(Commence as in form on page 35) that on, etc., at, etc., in the said county, the said A. B. made complaint to L. M., then a justice of the peace

¹ *Rex v. Niccols*, 2 Stra., 1227; *Reg. v. Kenrick*, 5 Q. B., 49; *Dev. & M.*, 208.

² *People v. Ollcott*, 2 John, Cas., 301.

³ *Poulterer's Case*, 9 Co., 55b, 56b, 57b; *Reg. v. Best*, 1 Salk., 174; *Com. v. Judd*, 2 Mass., 337; *State v. Buchannan*, 5 Har. & J., 371; *Hazen v. Com.*, 11 Harris Pa., 355; *U. S. v. Cole*, 5 McLean, 513.

⁴ *State v. Straw*, 42 N. H., 393; *State v. Pulle*, 13 Minn., 164; *Com. v. Eastman*, 1 Cush., 189; *State v. Noyes*, 25 Vt., 415; *Com. v. Davis*, 9 Mass., 415.

⁵ 3 Chitty Cr. L., 1141, 1143; *Reg. v. Murphy*, 8 Car. & P., 297; *Rex v. Parsons*, 1 W. Bl., 392; *Rex v. Cope*, 1 Stra., 144.

⁶ *State v. Sterling*, 34 Iowa, 443.

⁷ R. S., 364, § 83.

in and for the said county, and the said justice then and there examined the said A. B. and one E. F., a witness then and there produced by the said A. B. on oath, and then and there reduced the complaint to writing and caused it to be subscribed and sworn to by the said A. B., in which said complaint it was charged that E. F. had lately (*insert statement of the offense as in the complaint*), for which said offense the said L. M. then and there upon the said complaint and examination issued a warrant in due form of law under his hand and seal, directed to all sheriffs, coroners and constables within this state, commanding them forthwith to take the person of the said E. F. and bring him before the said L. M., or, in case of his absence or inability to act, before any other judge or justice of the said county, which said warrant was afterwards, *to wit.*, on the — day of —, A. D. 18—, at, etc., in the said county, delivered to C. D. then, at the time last aforesaid, one of the constables of the said county, to be by him executed, and that the said C. D. at the time and place last aforesaid, willfully and corruptly did delay, omit and refuse to arrest the said E. F., so charged with the said criminal offense, as he the said C. D., by virtue of his office aforesaid, by law should and ought to have done, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 667. **Aiding a Prisoner.**—"Whoever aids or assists in escaping or attempting to escape from an officer or person who has the lawful custody of such prisoner, shall be confined in the county jail not exceeding one year, or fined not exceeding five hundred dollars."¹

STATEMENT OF THE OFFENSE OF AIDING A PRISONER TO ESCAPE.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, unlawfully and knowingly did aid and assist one E. F., then and there a prisoner, in escaping from the custody of the said A. B., then and there being a sheriff of the said county, the said A. B. then and there as such sheriff having the lawful custody of the said E. F., contrary to the form of the statute in such case made and provided (*conclude as in form on page 25*).

§ 668. **Rescue.**—"Whoever rescues a prisoner from an officer or person who has the lawful custody of such prisoner, shall be confined in the county jail not exceeding one year, or fined not exceeding one thousand dollars, or both."²

¹ R. S., 364, § 84.

² Id., § 85.

STATEMENT OF THE OFFENSE OF RESCUING A PRISONER.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, unlawfully and knowingly did rescue one E. F., then and there being a prisoner, from the custody of the said A. B., the said A. B. then and there being a sheriff of the said county, and then and there as such officer having the lawful custody¹ of the said E. F., contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 669. **The Preceding Extend to Civil Process.** — “The two preceding sections shall extend to civil as well as criminal process, but in no case shall the fine exceed the sum for which the civil process issued.”²

§ 670. **Rescue of Prisoners Charged with High Crime Before Conviction.** — “Whoever sets at liberty or rescues, or attempts to set at liberty or rescue, a person charged with the commission of any capital offense or crime punishable by imprisonment in the penitentiary, before the conviction of such person, shall be imprisoned in the penitentiary not exceeding five years and fined not exceeding one thousand dollars.”³

STATEMENT OF THE OFFENSE OF SETTING AT LIBERTY A PRISONER CHARGED WITH A HIGH CRIME BEFORE CONVICTION.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, feloniously and unlawfully did set at liberty one E. F., from the custody of the said A. B., then being sheriff of the said county, the said E. F. then and there being charged with the commission of a capital offense, *to wit.*, of murder, as the said C. D. then and there well knew,⁴ and for the said offense⁵ was then and there in the lawful custody of the said⁶ A. B., as such sheriff as aforesaid, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

¹ An indictment is not defective for omitting to state the process on which the prisoner was held in custody, or the manner or circumstance of the holding. *Com. v. Lee*, 107 Mass., 207.

² R. S., 364, § 86.

³ *Id.*, § 87.

⁴ It is not necessary to allege that the defendant knew the person set at liberty was guilty of the alleged offense. *Rex v. Bootie*, 2 Bur., 864, 2 King, 575.

⁵ It is necessary to aver that the party set at liberty was in custody for the offense charged. 1 Russ. on C., 422, 423, 2 Hawks P. C. C., 19, § 26; *Rex v. Fell*, 1 Ld. Raym., 434, 1 Salk., 272.

⁶ In an indictment against a constable for an escape it is sufficient to

§ 671. **Rescue of a Prisoner Convicted of High Crime.** — “Whoever sets at liberty or rescues, or attempts to set at liberty or rescue, any person found guilty or convicted of a crime the punishment of which is death, shall be imprisoned in the penitentiary not less than one nor more than fourteen years. Whoever shall set at liberty or rescue, or attempt to set at liberty or rescue, any prisoner found guilty or convicted of a crime the punishment of which is imprisonment in the penitentiary, shall be imprisoned in the penitentiary not less than one nor more than ten years.”¹

STATEMENT OF THE OFFENSE OF RESCUING A PRISONER CONVICTED OF MURDER.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, feloniously and unlawfully did rescue one E. F. from the custody of the said A. B., then being sheriff of the said county, the said E. F. then and there having been found guilty and convicted, as the said C. D. then and there well knew, of the crime of murder, the punishment of which was death, and for the said crime was then and there in the lawful custody of the said A. B. as such sheriff as aforesaid, contrary to the form of the statute in such case made and provided (*conclude as in the form on page 35*).

§ 672. **Officer Allowing Before Conviction** — “If any sheriff, coroner, jailor, keeper of a prison, constable or other officer or person having any prisoner in his legal custody, before conviction, shall voluntarily suffer or permit such prisoner to escape or go at large, such officer or person so offending shall be fined not exceeding one thousand dollars, and confined in the county jail not exceeding six months: *Provided*, that if such prisoner be in custody charged with murder or other capital offense, then such officer or person suffering or permitting such escape shall be punished by confinement in the penitentiary for any term not less than one year nor more than ten years. A negligent escape of a person charged with a criminal offense, before conviction, from the custody of any of

allege that the defendant permitted the prisoner to escape and go at large, without alleging in addition that he did escape and go at large. *State v. Mayberry*, 3 Stro., 144.

¹ R. S., 364, § 88.

the aforesaid officers, shall be punished by fine not exceeding one thousand dollars.”¹

STATEMENT OF THE OFFENSE OF SUFFERING AN ESCAPE BY A JAILER.

(Commence as in form on page 35) ² that C. D., on, etc., at, etc., in the said county, then being jailer of the said county and then and there having one E. F., then a prisoner, in his, the said C. D.’s, legal custody for the offense of murder before conviction therefor, with which said offense the said E. F. was then and there charged, feloniously and voluntarily did suffer and permit the said E. F. to escape and go at large, whithersoever he would, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 673. **Officer Allowing after Conviction.** — “If any sheriff, deputy sheriff, coroner, jailer, or other officer, shall fraudulently contrive, procure, conceal, aid, connive at or otherwise voluntarily suffer the escape of any convict in his custody, or conceal or assist any convict, after he has escaped, he shall be imprisoned in the penitentiary not less than one nor more than ten years.”³

§ 674. **Officer of Penitentiary Allowing.** — “If the warden or any officer, guard, agent, servant of, or person employing convicts in or about, the penitentiary, shall contrive, procure, aid, connive at, conceal or assist the escape of any convict from the penitentiary, or conceal or assist any convict after he has escaped, he shall be imprisoned in the penitentiary not less than one nor more than ten years.”⁴

STATEMENT OF THE OFFENSE OF SUFFERING AN ESCAPE BY THE WARDEN OF THE PENITENTIARY.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, then warden of the penitentiary of the said State of Illinois, feloniously and fraudulently did contrive, procure, aid, connive at, conceal and assist the escape of one E. F., then and there being a convict duly commit-

¹ R. S., 364, § 89.

² An indictment usually sets forth facts sufficient to give the committing magistrate jurisdiction and the commitment or an indictment and commitment. 2 Bish. Cr. P., § 941.

³ R. S., 365, § 90.

⁴ Id., § 91.

ted to the said penitentiary for the crime of larceny, from the said penitentiary, and the said E. F. did then and there escape and go at large, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 675. **Aiding Escape.** — “Whoever conveys into the penitentiary, or into any jail or other place of confinement, any disguise, instrument, tool, weapon, or other thing adapted or useful to aid a prisoner in making his escape, with the intent to facilitate the escape of any prisoner there lawfully committed or detained, or by any means whatever aids or assists such prisoner to escape therefrom, whether such escape is effected or attempted or not, or conceals or assists any convict after he has escaped, shall be confined in the county jail not exceeding one year, or fined not exceeding one thousand dollars, or both.”¹

STATEMENT OF THE OFFENSE OF CONVEYING A DISGUISE TO A PRISONER.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, unlawfully and knowingly did convey into the county jail of the said county and deliver to one E. F. a certain disguise, *to wit.*, a woman's apparel then and there adapted and useful to aid a prisoner to make his escape, with intent to facilitate the escape of the said E. F., then and there a prisoner in the said jail, lawfully committed and detained, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 676. **What an Escape.** — An escape is where one who is arrested gains his liberty before he is delivered by the course of law.² Where the liberation is effected either by himself or others without force, it is more properly called an escape; where it is effected by the party himself with force it is called prison-breaking; and where it is effected by others with force it is commonly called a rescue.³ To constitute an escape there must be an actual arrest and a legal and continuing imprisonment;⁴ and therefore it has been held that if an officer hav-

¹ R. S., 365, § 92.

² *Colby v. Sampson*, 5 Mass., 310; *Lowry v. Barnes*, 2 Chapman, 11.

³ 2 Arch. C. P. & Pl., 1074.

⁴ 2 Bish. Cr. L. § 1094.

ing a warrant to arrest a man, see him shut up in a house and challenge him as his prisoner, but never actually have him in custody, and the party get free, the officer cannot be charged with an escape.¹

§ 677. *Continued — Use of Force, etc., not Necessary.* — It is not criminal to aid or suffer a prisoner to escape if he is unlawfully detained in custody.² But if he is in custody under a proper warrant duly issued, though he may be entirely innocent of the charge, any person aiding in the escape or any officer suffering it will be criminally liable under the statute.³ And it is also criminal for a prisoner so imprisoned to escape, though no force or artifice be used on his part to effect such purpose.⁴ Thus, if a prisoner go out of his prison without any obstruction, the doors being opened by the negligence or consent of the jailor, or if he escapes in any other manner without using any kind of force or violence, he will be guilty of a misdemeanor; and if his prison be broken by others without his procurement or consent, and he escapes through the breach so made, he may be indicted for the escape.⁵

§ 678. *Who Liable for an Escape.* — Any person who is acting in the capacity of an officer is liable for permitting an escape, though he has not been duly elected or qualified, and his title to the office is not legal.⁶ Even a private person may be guilty of an escape by allowing a prisoner who is lawfully in his custody to go at large, instead of delivering him to the proper officer.⁷ A constable is indictable for suffering a street-walker delivered to his custody by one of the night watch to escape.⁸ The better opinion seems to be that a sheriff is not

¹ 2 Hawks P. C. C., 19, § 1.

² 2 Hawks P. C. C., 19, §§ 2, 4; Luckey v. State, 14 Texas, 400.

³ 2 Hawks P. C., 185; 2 Inst., 590; Com. v. Miller, 2 Ashm., 61; State v. Murray, 3 Ship., 100; State v. Bates, 23 Iowa, 97.

⁴ 2 Hawks P. C. C., 17, § 5; 4 Black. Com., 129; Com. v. Miller, 2 Ashm., 61; *contra*, State v. Murphy, 5 Engl., 74.

⁵ 1 Hale P. C., 611; 2 Inst., 590; Riley v. State, 16 Conn. R., 47.

⁶ 2 Hawks P. C. C., 19, §§ 23, 28; Com. v. Connell, 3 Grat., 587; State v. Maberry, 3 Strob., 144; State v. Bates, 23 Iowa, 97.

⁷ 2 Hawks P. C. C., 20, § 1; 1 Hale P. C., 595.

⁸ Rex v. Bootie, 2 Bur., 864, 2 Kenny, 575.

criminally liable for the act of his deputy in suffering an escape.¹

§ 679. **Who not Liable for an Escape.**—In Missouri, under their statute, it has been held that it is not an offense to rescue a prisoner from the hands of a private person unless the one rescuing him knows that the prisoner was under an arrest for a felony or misdemeanor;² but it would probably be held otherwise under our statute.³ In New York, it has been held that lying in wait near a jail by agreement with the prisoner, and carrying him away, is not an offense against the statute, for the reason that the aid was not rendered until after the escape was accomplished, but is a misdemeanor at common law.⁴

§ 680. **Evidence.**—If a prisoner breaks jail or escapes, the presumption is that the officer having him in custody was guilty of negligence in allowing him to escape.⁵ But this presumption may be rebutted by competent evidence.⁶ Under an indictment charging the aiding and assisting the escape of a prisoner, the defendant cannot be convicted upon proof that the prisoner was in custody of the defendant and that he negligently suffered him to escape.⁷

4. FALSELY ASSUMING AN OFFICE.

§ 681. **Provisions of the Statute.**—“Whoever falsely assumes or pretends to be a justice of the peace, sheriff, deputy sheriff, coroner, constable, police officer, watchman or other officer, and takes upon himself to act as such, or to require any person to aid or assist him in a matter pertaining to the duty of

¹ *Com. v. Lewis*, 4 Leigh, 664; *State v. Berkshire*, 2 Ind., 207; 1 East P. C., 331; *Rex v. Lenthall*, 3 Mod., 143; *Reg. v. Belwood*, 11 Mod., 80; *contra*, *Rex v. Fell*, 1 Ld. Raym., 425; 1 Salk., 272.

² *State v. Helton*, 26 Mo., 199; see also *Rex v. Burridge*, 3 P. Wins., 493.

³ R. S., 364, § 85.

⁴ *People v. Tompkins*, 9 John., 70.

⁵ 1 Hale P. C., 601; 2 Bish. Cr. L., § 1096.

⁶ 1 Russ. Cr. L., 371; *Connell's Case*, 3 Grat., 587; but see *State v. Halford*, 6 Rich., 58.

⁷ *White v. State*, 13 Texas, 133.

any such officer, shall be confined in the county jail not exceeding one year, or fined not exceeding five hundred dollars.”¹

STATEMENT OF THE OFFENSE OF FALSELY ASSUMING TO BE A JUSTICE OF THE PEACE.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, unlawfully and falsely did assume and pretend to be a justice of the peace in and for said county, and did then and there take upon himself to act as such justice of the peace,² contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

5. MISCONDUCT OF OFFICERS.

§ 682. Omission and Malfeasance.—“Every person holding any public office, whether state, county or municipal,³ trust or employment, who shall be guilty of any palpable omission of duty, or who shall be guilty of diverting any public money from the use or purpose for which it may have been appropriated or set apart by or under authority of law, or who shall be guilty of contracting, directly or indirectly, for the expenditure of a greater sum or amount of money than may have been, at the time of making the contracts, appropriated or set apart by law, or authorized by law to be contracted for or expended upon the subject matter of the contracts, or who shall be guilty of willful and corrupt oppression, malfeasance or partiality, where no special provision shall be made for the punishment thereof, shall be fined not exceeding ten thousand dollars, and may be removed from his office, trust or employment.”⁴

STATEMENT OF THE OFFENSE OF REFUSING TO ADMINISTER AN OATH FOR A CHANGE OF VENUE BY A JUSTICE OF THE PEACE.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in said county, then being a justice of the peace, duly elected, qualified, and com-

¹ R. S., 366, § 102.

² This statement of the offense is sufficient. *Com. v. Wolcott*, 10 Cush., 61, 63.

³ The word “municipal” includes a town as well as a city. 2 Burrill L. Dic., 215; and therefore the section applies to town officers.

⁴ R. S., 383, § 208; *Tibbals v. State*, 5 Wis., 596.

missioned, and a certain suit being then and there depending and undetermined before him, wherein one E. F. was plaintiff and the said A. B. was defendant, at the time and place appointed for, and before the commencement of the trial of the said suit, willfully and corruptly¹ refused to administer an oath in the said suit as required by law to the said A. B.; that it was the belief of him, the said A. B., that he, the said A. B., the defendant in said suit as aforesaid, could not have an impartial trial in the said suit before the said C. D. as such justice, though the said A. B. then and there offered to take the said oath, and then and there requested the said C. D. to administer the same to him, and then and there tendered to the said C. D. the sum of five cents as his fee as such justice for administering the said oath,² and then and there made a motion for a change of venue in the said suit to another justice of the peace, and so the said C. D. then and there was thereby willfully and corruptly guilty, in the manner and form aforesaid, of a palpable omission of duty as such justice of the peace, in the said suit, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 683. **Effect of Ignorance of the Law.** — Justices of the peace and other tribunals are not, like ordinary persons, conclusively presumed to know the law;³ therefore a mere error in judgment or departure from sound policy is not sufficient to subject a tribunal possessing a discretionary power to an indictment for a palpable omission of duty. Before such prosecution can be sustained it must be shown that there was a palpable omission of duty imperatively required by law in a mat-

¹ An indictment for malfeasance in office in refusing to issue subpoenas should charge that he willfully and corruptly refused to issue the subpoenas. *Jones v. People*, 2 Scam., 477. An indictment charging that the defendant, a justice of the peace, took up certain stray animals (*specifying the number and kind*) and corruptly caused the same to be appraised before himself, is substantially good. *Wickersham v. People*, 1 Scam., 128. In prosecuting supervisors for not putting up guide boards, under a former statute it was held that the indictment should allege at what crossings of public roads in the road district the neglect occurred. *Lequat v. People*, 11 Ills., 330. For present statutes on the subject, see R. S., 915; § 10, Sub. 10; *Id.*, 944, §§ 173, 174.

² Possibly it may be necessary to allege and prove that the fee of the justice for taking the oath was tendered to him. *People v. Brooks*, 1 Denio, 457; or that it was waived by not demanding it.

³ *Hiss v. State*, 24 Md., 556; *State v. Campbell*, 2 Tyler, 177; *Yates v. Lansing*, 5 John., 282, 293; *Floyd v. Baker*, 12 Co., 23; *contra*, 4 Black. Com., 227; *Rex v. Esop*, 7 Car. & P., 456; *People v. Brooks*, 1 Denio, 459.

ter involving no discretion or a willful and corrupt as well as a palpable neglect of a discretionary duty.¹ But where the duty is purely ministerial, not judicial, and there is no discretionary power, ignorance of the law is no excuse, and an honest conviction that one has a right to omit to do what the law imperatively and palpably requires will not justify the omission to perform such requirement.²

§ 684. Justices, when Criminally Liable for Omission of Duty.—Indictments have been sustained against justices of the peace for convicting defendants without summonses;³ for sending a man to the house of correction without cause;⁴ for discharging an offender without sufficient sureties;⁵ for bailing a prisoner in a case not authorized by statute;⁶ for refusing bail, or a particular person as such;⁷ for adding to an order requiring the concurrence of two justices, the name of the second one;⁸ for making a false return to a mandamus;⁹ for setting as a magistrate in a case in which he was personally interested;¹⁰ for issuing a warrant where there was no complaint and proceeding under the same;¹¹ for not attempting to suppress a riot;¹² for willfully and corruptly refusing to issue a subpœna;¹³ for refusing to swear the defendant to an affidavit prepared for the purpose of procuring the cause to be discontinued under

¹ *Eyman v. People*, 1 Gilm., 8; *Rex v. Stukey*, 12 Mod., 493; *State v. Gardiner*, 2 Mo., 23; *Jones v. People*, 2 Scam., 477.

² *People v. Brooks*, 1 Denio, 459; *People v. Norton*, 7 Barb., 477, 480; *People v. Coon*, 15 Wen., 277; *Tibbals v. State*, 5 Wis., 496.

³ *Rex v. Allington*, 2 Stra., 678; *Rex v. Cotton*, W. Kel., 125; *State v. Odell*, 8 Blackf., 396.

⁴ *Rex v. Okey*, 8 Mod., 45.

⁵ *Rex v. Lediard*, Say., 242; *Respublica v. Burns*, 1 Yates, 370; *Reg. v. Tracy*, 6 Mod., 179; *People v. Coon*, 15 Wen., 277.

⁶ *Rex v. Clark*, 2 Stra., 1216; *Rex v. Brooks*, 2 T. R., 190.

⁷ *Rex v. Badger*, 6 Jur., 994; *Rex v. Jones*, 1 Wils., 7.

⁸ *Rex v. Howard*, 7 Mod., 307.

⁹ *Anon.*, Loft, 185.

¹⁰ *Wickersham v. People*, 1 Scam., 128; *Rex v. Davis*, Loft, 62.

¹¹ *Wallace v. Com.*, 2 Va. Cas., 130.

¹² *Respublica v. Montgomery*, 1 Yates, 419; *Reg. v. Neale*, 9 Car. & P., 431.

¹³ *Jones v. People*, 2 Scam., 477.

a statute;¹ and for some other improper acts and omissions.² If a magistrate acts from passion or from opposition, that is equally corrupt, as if he acted for a pecuniary consideration.³ An indictment may be found and sustained against a constable or sheriff for willfully and corruptly making a false return to process which it was his duty to execute.⁴

§ 685. **Extortion.** — "If any judge, justice of the peace, sheriff, coroner, constable, police officer, clerk or other officer, state, county, town or municipal, executive, ministerial, or judicial, shall willfully or corruptly receive or take any fee or reward to execute or do his duty as such officer, except such as is or shall be allowed by law, or if any such officer shall willfully or corruptly ask or demand as a condition precedent to the performance of his duty as such officer any fee or reward, except such as shall be allowed by law, every such officer so offending shall be fined not exceeding two hundred dollars, and may be removed from office."⁵

STATEMENT OF THE OFFENSE OF EXTORTION.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, then being a justice of the peace in and for the said county, duly elected, qualified and commissioned in a certain cause then lately tried and determined before the said C. D. as such justice, wherein the said A. B. was plaintiff, and one E. F. was defendant, and wherein a judgment was rendered against the said E. F., extorsively, willfully and corruptly did take and receive the sum of seventy-five cents as a fee and reward to do his duty as such officer in issuing an execution on the said judgment, which said sum of seventy-five cents was not then allowed by law as a fee to a justice of the peace for issuing an execution upon a judgment, but the said C. D. was then and there by law entitled to take and receive only the sum of twenty-five cents for issuing the said execution, leaving the sum of fifty cents then and there extorsively, willfully and corruptly taken and received as a fee and reward to execute and do his duty as such justice of the peace against the form of the statute in such case made and provided (*conclude as in form on page 35*).

¹ *People v. Brooks*, 1 Denio, 457.

² *Rex v. Fielding*, 2 Bur., 719; *Rex v. Phelps*, 2 Keny, 570; *Rex v. Wykes*, Andr., 238.

³ *Rex v. Brooks*, 2 T. R., 190, 195.

⁴ *Tibbals v. State*, 5 Wis., 596.

⁵ R. S., 383, § 211; *State v. Bevans*, 37 Iowa, 178.

§ 686. **Shaving Warrants, etc.** — “ If any collector of taxes, county treasurer, or other person authorized to collect, receive, or pay out any of the state, county, city, or school revenues, shall directly or indirectly, by himself or his agent, take, buy, shave, discount or receive any auditor’s warrant, county order, or jury certificate, or city or school order, at less than the full sum due thereon, or shall directly or indirectly receive any profit or advantage on account of any other person’s buying, shaving or discounting any such warrant, order, or jury certificate, such as collector, treasurer or other person, shall be liable in double the amount made thereby, to be recovered in an action of debt before any court of competent jurisdiction, one-half to the person complaining, and the other half to the school fund of the county where such collector, treasurer or the person may reside.”¹

§ 687. **Withholding Funds.** — “ If any state, county, town, municipal or other officer or person, who now is or hereafter may be authorized by law to collect, receive, safely keep or disburse any money, revenue, bonds, mortgages, coupons, bank bills, notes, warrants or dues, or other funds or securities belonging to the state, or any county, township, incorporated city, town or village, or any state institution, or any canal, turnpike, railroad, school or college fund, or the fund of any public improvement that now is or may hereafter be authorized by law to be made, or any other fund now in being or that may hereafter be established by law for public purposes, or belonging to any insurance or other company or person, required or authorized by law to be placed in the keeping of any such officer or person, shall fail or refuse to pay or deliver over the same when required by law, or demand is made by his successor in office or trust, or the officer or person to whom the same should be paid or delivered over, or his agent or attorney, authorized in writing, he shall be imprisoned in the penitentiary not less than one nor more than ten years: *Provided*, such demand need not be made when, from the absence or fault of the offender, the same cannot conveniently be made:

¹ R. S., 383, § 212.

And provided, that no person shall be committed to the penitentiary under this section, unless the money not paid over shall amount to one hundred dollars, or if it appear that such failure or refusal is occasioned by unavoidable loss or accident. Every person convicted under the provisions of this section shall forever thereafter be ineligible and disqualified from holding any office of honor or profit in this state.”¹

STATEMENT OF THE OFFENSE OF WITHHOLDING FUNDS BY A COUNTY
TREASURER FROM HIS SUCCESSOR.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, then being county treasurer of the said county, duly elected, qualified and commissioned, and then and there authorized by law to collect, receive, safely keep and disburse the money belonging to the said county, did as such county treasurer collect, receive and keep the sum of five-thousand dollars in money belonging to the said county; that afterwards, *to wit.*, on the — day of —, A. D. 18—, in the said county, one E. F. was duly elected the successor of the said C. D. to the said office of county treasurer of said county, and afterwards, *to wit.*, on the — day of —, A. D. 18—, was duly qualified and commissioned as such county treasurer: that C. D. afterwards, *to wit.*, on the — day of —, A. D. 18—, in said county, the term of office of the said C. D. as such county treasurer then at the time last aforesaid having expired, and the said C. D. then, at the time last aforesaid, still having in his hands as such county treasurer as aforesaid, the said sum of five thousand dollars in money so collected, received and kept as aforesaid, feloniously did fail and refuse to pay over the said sum of five thousand dollars, or any part thereof, to the said E. F., as required by law, on demand therefor, then and there made by the said E. F., his successor in the said office of county treasurer as aforesaid, against the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 688. *Withholding Records, etc., from Successor.*—“If any person whose office shall be abolished by law, vacated or determined by removal from office, resignation, death, expiration of the time for which he was elected or appointed, or other cause, or his executors, administrators or other persons, shall willfully and unlawfully withhold or detain from his successor or other person entitled thereto by law, the records, papers, documents or other writings, or other articles of property ap-

¹ R. S., 384, § 215.

pertaining or belonging to such office, or mutilate, destroy or take away the same, the person so offending shall be imprisoned in the penitentiary not less than one nor more than five years.”¹

STATEMENT OF THE OFFENSE OF WITHHOLDING RECORDS, ETC., BY A JUSTICE OF THE PEACE FROM HIS SUCCESSOR.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, having been justice of the peace of the said county, duly elected, commissioned and qualified, and the term of his said office as such justice of the peace then having expired, willfully and unlawfully did withhold and detain the records, papers, documents and other writing pertaining and belonging to the said office from the said A. B., the said A. B. then and there being entitled thereto by law, being then and there the successor of the said C. D., in the said office of justice of the peace, duly elected, qualified and commissioned, against the form of the statute in such case made and provided (conclude as in form on page 35)

6. PERJURY.

§ 689. **Definition and Punishment.** — “Every person, having taken a lawful oath or made affirmation, in any judicial proceeding or in any other matter where by law an oath or affirmation is required, who shall swear or affirm, willfully, corruptly and falsely, in a matter material to the issue or point in question, or shall suborn any other person to swear or affirm, as aforesaid, shall be deemed guilty of perjury or subornation of perjury (as the case may be), and shall be imprisoned in the penitentiary not less than one nor more than fourteen years.”²

§ 690. **Indictment.** — “In every indictment for perjury or subornation of perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and before what court or authority the oath or affirmation was taken, averring such court or authority to have had full power to administer the same, together with the proper averments to falsify the matter wherein perjury is assigned, without setting forth

¹ R. S., 384, § 216.

² Id., 387, § 225.

any part of the records or proceedings, either in law or equity, other than as aforesaid, and without setting forth the commission or authority of the court, or other authority before whom the perjury was committed, or the form of the oath or affirmation, or the manner of administering the same."¹

§ 691. *Attempt to Suborn.* — "Whoever endeavors to incite or procure any other person to commit perjury, though no perjury is committed, shall be imprisoned in the penitentiary not less than one nor more than five years, or confined in the county jail not exceeding one year, and fined not exceeding one thousand dollars."²

STATEMENT OF THE OFFENSE OF PERJURY.³

(*Commence as in form on page 35*) that on, etc., at, etc., in the said county, before L. M., then a justice of the peace in and for the said county, duly elected, qualified, and commissioned, a certain issue⁴ which was then and there joined between one E. F., plaintiff, and one G. H., defendant, before the said L. M., as such justice of the peace, in a certain action of assumpsit upon a contract in which the damages claimed did not exceed the sum of two hundred dollars,⁵ came on to be tried, which said action had be-

¹ R. S., 387, § 227.

² *Id.*, § 228.

³ For forms of indictments, see *People v. McKenney*, 3 Park. Cr. R., 510; *People v. Sweetman*, 3 Park. Cr. R., 358; *People v. Burroughs*, 1 Park. Cr. R., 212; *Com. v. Warren*, 11 Met., 406. On an indictment for perjury, in taking the oath of bankruptcy, it is too indefinite to charge generally that the defendant committed perjury in falsely swearing to his schedule. It should be charged in what particular the perjury consisted. *U. S. v. Morgan*, Morris Iowa, 341. The substance of the statutory definition of the offense must be charged in the indictment, and that by no remote or doubtful inference. *U. S. v. Dickey*, Morris Iowa, 412.

⁴ It must appear that the oath was taken in a judicial proceeding, or on some other lawful occasion, or for such a purpose. *Morrell v. People*, 32 Ills., 501; *State v. Lamont*, 2 Wis., 437.

⁵ It is sufficient to allege that the court had jurisdiction over the cause, instead of setting out the facts from which the same appears. *Com. v. Knight*, 12 Mass., 273; *State v. Newton*, 1 Greene R., 160; *People v. Phelps*, 5 Wen., 9; *People v. Warner*, 5 Wen., 271; *State v. Farrow*, 10 Rich., 165; *contra*, *State v. Lamont*, 2 Wis., 437; *State v. Hanson*, 39 Me., 337. But it must appear that the court or justice had jurisdiction. *State v. Furlong*, 26 Me., 69; *State v. Alexander*, 4 Hawks, 182; *Buxton v. Couch*, 3 Salk., 269.

fore that time been commenced and was then and there pending¹ before the said L. M. as such justice of the peace, and which issue was then and there tried in due form of law; that upon the trial of the said cause, C. D. appeared as a witness for and in behalf of the said G. H., and was then and there duly sworn² (or "affirmed") by the said L. M.³ as such justice of the peace, as a witness, and examined in the said cause, the said L. M. as such justice of the peace, then and there⁴ having full power and authority to administer the said oath⁵ (or "affirmation") to the said C. D. in that behalf; that upon the trial of the said cause it became material⁶ to the said issue to inquire whether the said E. F. was at Chicago

¹ There must be an allegation that the cause was pending at the time the oath was taken. *Morrell v. People*, 32 Ills., 502.

² It is sufficient to allege that the defendant was "duly sworn," without setting out the form of the oath, the manner of administering the same, R. S., 387, § 227, or describing the attendant ceremonies. *State v. Farrow*, 10 Rich., 165; *Republica v. Newell*, 3 Yeates, 407; *Dodge v. State*, 4 Zab., 455; *Rex v. McCarthy*, Peake, 155; *Tuttle v. People*, 36 N. Y., 431; *Com. v. Warden*, 11 Met., 406.

³ It must be set forth by whom the oath was administered. *Kerr v. People*, 42 Ills., 307; *State v. Ellison*, 8 Blackf., 225. But an indictment for perjury, stating that the defendant came before L. M., a justice, etc., and then, etc., was sworn before the said L. M., being such justice, etc., shows with sufficient certainty by whom the oath was administered. *State v. Ellison*, 8 Blackf., 225. Where the indictment charged that the oath was taken before the judge, and the evidence was thereupon given to the jurors, this, it was held, was the proper way of stating the oath. *State v. Witheron*, 3 Murphy, 153.

⁴ The words "then and there" are unnecessary. *State v. Dayton*, 3 Zab., 49

⁵ It must appear that the oath was administered by a person having competent legal authority. *Morrell v. People*, 32 Ills., 501; *Rex v. Callanan*, 6 B. & Cres., 102; *Halleck v. State*, 11 Ohio, 400; *State v. Plummer*, 50 Me., 217; *State v. Furlong*, 26 Me., 69; *State v. Alexander*, 4 Hawks, 182; *State v. Newton*, 1 Iowa, 160. It has been held to be sufficient to charge that the defendant was "duly sworn," *State v. O'Hagan*, 38 Iowa, 504; *Dodge v. State*, 4 Zab. N. J., 455; *State v. Fanon*, 10 Rich. Law, S. C., 165; or that he was sworn and examined as a witness, *State v. Norris*, 9 N. H., 96, 3 Greenl. Ev., § 192; or that he "did take his corporal oath before said board," *Campbell v. People*, 8 Wen., 636; and that an indictment containing either of these allegations was not subject to the objection that it did not charge the oath to have been administered by any one. *State v. O'Hagan*, 38 Iowa, 504. In Indiana a general averment that the clerk had the competent power to administer the oath was held not to be sufficient. *McGregor v. State*, 1 Carter, 232.

⁶ It is sufficient to aver that the matters in relation to which perjury was assigned became and were material, *Com. v. Johns*, 6 Gray, 274; *Rex v.*

on the first day of September, A. D., 1874, and that thereupon the said C. D., then and there being so sworn as a witness as aforesaid, and having taken a lawful oath in the said judicial proceeding, where an oath or affirmation was by law required, did then and there,¹ on the trial of the said cause before the said justice, feloniously, willfully,² corruptly and falsely, in a matter material to the said issue, depose, swear (*or affirm*) and testify in substance, amongst other things, that the said E. F. was not at Chicago on the first day of September, A. D. 1874; whereas,³ in truth and in fact, as the said C. D. then well knew,⁴ the said E. F. was in Chicago on the said first day of September, A. D. 1874, against the form of the statute in such case made and provided⁵ (*conclude as in form on page 35*).

Dowlin, 5 T. R., 311; *State v. Dayton*, 3 Zab., 49; without setting forth the facts showing them to be so. *Campbell v. People*, 8 Wen., 636; *People v. Burroughs*, 1 Park. Cr. R., 223; *contra*, *Conner v. Com.*, 2 Va. Cas., 30; *Com. v. Lodge*, 2 Grat., 579; but the materiality of the fact falsely sworn to must be averred. 2 Whart. Cr. L., § 2263; *Morris v. People*, 32 Ills., 502; *State v. Beard*, 1 Dutcher, 384; *People v. Collier*, 1 Manning, 137; *Com. v. Pickering*, 8 Grat., 628; *State v. Moffat*, 7 Humph., 250.

¹ If the facts be stated as to time or place with uncertainty or repugnancy, the indictment will be bad. *State v. Hardwick*, 2 Mo., 185; *State v. McKennan*, Harp., 302.

² The words "willfully, corruptly, and falsely" are essential, because these are the statutory words. *Rex v. Cox*, 1 Leach, 71; *Rex v. Taylor*, 1 Show, 190; *Rex v. Richards*, 7 Dowl. & Ry., 665; *U. S. v. Babcock*, 4 McLean, 113; *State v. Carland*, 3 Dev., 114; *State v. Morse*, 1 Iowa, 503.

³ Each fact falsely deposed to must be negatived. 2 Whart. Cr. L., § 2259; *State v. Mumford*, 1 Dev., 519; *State v. Raymond*, 20 Iowa, 582; but see *Lindenberg v. State*, 13 Texas, 27; a general averment falsifying the testimony, *State v. Lea*, 3 Ala., 602; *State v. Bishop*, 1 Chip. Vt., 120; *State v. Mumford*, 1 Dev., 519; *Rex v. Parratt*, 2 M. & S., 397; *Rex v. Harris*, 1 Dowl. & Ry., 578; or that the defendant falsely swore so and so is not sufficient. *Rex v. Parratt*, 2 M. & S., 379; *Rex v. Harris*, 1 Dowl. & Ry., 578, 5 Barne. & Ald., 926; *Reg. v. Wheatland*, 8 Car. & P., 238. The words "whereas he did know" the words spoken were false, have been held a sufficient averment as to the falsity of the evidence. *State v. Wood*, 17 Iowa, 18.

⁴ An averment that the defendant "well knew" the reverse of the facts to which he testified has been adjudged good, *State v. Lindenberg*, 13 Texas, 27; and to be necessary in some cases; *Com. v. Cook*, 1 Robinson, 729.

⁵ Where the indictment sufficiently charges a common-law perjury, the conclusion against the form of the statute may be rejected as surplusage. *State v. Kennerly*, 10 Rich., 152.

STATEMENT OF THE OFFENSE OF SUBORNATION OF PERJURY.

(Commence as in last form and continue down to and including the words "and that thereupon" and then add) I J. did feloniously, willfully and corruptly¹ suborn, incite and procure the said C. D., being so sworn as a witness as aforesaid, and having taken a lawful oath in the said judicial proceeding where by law an oath or affirmation was required, then and there on the trial of the said cause before the said justice of the peace to feloniously, willfully, corruptly and falsely, in a matter material to the said issue, to swear (or "affirm") and testify amongst other things that the said E. F. was not at Chicago on the first day of September, A. D. 1874; and that the said C. D. did then and there feloniously, willfully, corruptly and falsely so testify before the said justice of the peace; whereas, in truth and in fact, as both the said C. D. and I. J. well knew, the said E. F. was not in Chicago on the said first day of September, A. D. 1874 (*conclude as in last form*).

§ 692. Evidence. — 1. The Prosecutor must Prove that the Oath was Administered by One Having Competent Legal Authority to Administer an Oath,² otherwise there is no perjury in the false testimony given under it.³ If it is administered by a judge of a state court out of the territorial jurisdiction of the state,⁴ or by an officer or tribunal not having jurisdiction of the subject matter,⁵ or by a master in chancery in a matter pending in a court of the United States,⁶ or by a proper officer acting under an invalid appointment,⁷ there can be no perjury. But proof that the oath was administered by one who habitually acted in the capacity of a particular officer authorized by law

¹ Insert the words "endeavor to" before the word "suborn" and omit the words "and that the said C. D. did then and there feloniously, willfully, corruptly and falsely so testify before the said justice of the peace," and the statement will be sufficient for an attempt to suborn a witness to commit perjury.

² *Morrell v. People*, 32 Ills., 499; *Kerr v. People*, 42 Ills., 307; *State v. Furlong*, 26 Me., 69; *State v. Wyatt*, 2 Hayw., 56.

³ *Rex v. Wood*, 2 Russ. on C., 632; *McGregor v. State*, 1 Ind., 232; *State v. McCroskey*, 3 McCord, 308; *Rex v. Hanks*, 3 Car. & P., 419.

⁴ *Jackson v. Humphrey*, 1 John., 498.

⁵ 2 Whart. Cr. L., § 2211; *State v. Alexander*, 4 Hawks, 182; *Pankey v. People*, 1 Scam., 81; *Com. v. White*, 8 Pick., 453; *State v. Furlong*, 26 Me., 69; *Reg. v. Ervington*, 2 Moody, 223; *Montgomery v. State*, 10 Ohio, 220; *Clark v. Ellis*, 2 Blackf., 8.

⁶ *Reg. v. Stone*, 22 Eng. L. & Eq., 593.

⁷ 1 Hawks P. C., 431; 2 Bish. Cr. L., § 1020; *Muir v. State*, 8 Blackf., 154.

to administer the oath, is sufficient until rebutted.¹ And probably if the oath was administered by one who was an officer, that is, one who was doing the duties of the office under color of title, it would be sufficient.²

§ 693. 2. Proof that the Oath was Administered and Taken in a Judicial Proceeding, or in a Matter where by law an Oath or Affirmation was Required, is indispensable;³ for an extra judicial oath lays no foundation for a prosecution for perjury;⁴ as if a man swears falsely in a voluntary affidavit made before a justice of the peace before whom no cause is depending, it is no perjury.⁵ It is not material in what form the oath was administered, provided the prisoner at the time professed such form to be binding on his conscience,⁶ unless a different form is alleged so as to make the evidence vary from the allegation.⁷ Thus where it was alleged that the oath was taken on the gospels, and the proof was that it was taken with the uplifted hand, the variance was held to be fatal.⁸ An allegation that the prisoner "took her corporal oath" was held to be satisfied by proof of an oath taken in the ordinary way.⁹ Where the

¹ *Morrell v. People*, 32 Ill., 499; *R. v. Verelest*, 3 Campb., 432; *State v. Gregory*, 2 Murphy, 69; *State v. Hascall*, 6 N. H., 358; *Server v. State*, 2 Blackf., 35.

² 1 Bish. Cr. L., § 464; 3 Greenl. Ev., § 190; 2 Arch. C. P. & Pl., 971; *Reg. v. Newton*, 1 Car. & K., 469; *Mahan v. Berry*, 5 Mo., 21; *State v. Hascall*, 6 N. H., 352; *State v. Gregory*, 2 Murphy, 69; *Rex v. Verelist*, 3 Campb., 432; *Rex v. Howard*, 1 M. & Rob., 187.

³ R. S., 387, § 225; *Morrell v. People*, 42 Ills., 499; *State v. Chamberlain*, 30 Vt., 555; *State v. Simons*, 30 Vt., 620.

⁴ *U. S. v. Babcock*, 4 McLean, 113.

⁵ 2 Arch. C. P. & Pl., 955; 2 Whart. Cr. L., § 2222; *Jackson v. Humphrey*, 1 John., 498; *Pegram v. Styron*, 1 Bailey, 595; *Lamden v. State*, 5 Humph., 83; *Waggoner v. Richmond*, Wright, 173; *Rex v. Foster*, Russ. & Ry., 459; *contra*, *Chapman v. Gillett*, 2 Conn., 40; *Arden v. State*, 1 Conn., 404.

⁶ 2 Arch. C. P. & Pl., 956; 2 Whart. Cr. L., § 2205; *Com. v. Knight*, 12 Mass., 274; *People v. Cook*, 8 N. Y., 67; *State v. Dayton*, 3 Zab., 49; *Sharp v. Wilhite*, 2 Humph., 434; *Rex v. Rowley*, R. & M., N. P. 302.

⁷ 3 Greenl. Ev., § 192; *State v. Coffey*, N. C. Tenn., 272; *People v. Warner*, 5 Wen., 271.

⁸ *State v. Porter*, 2 Hill S. C., 611; *Rex v. McArthur*, Peake, 155.

⁹ 2 Chitty Cr. L., 358; *State v. Norris*, 9 N. H., 96; *Jackson v. State*, 1 Ind., 184; *Respublica v. Newell*, 3 Yeates, 407.

oath was made to an affidavit or other written paper signed by the party, the original must be produced with proof of his handwriting, and that of the magistrate before whom it was sworn; which will be sufficient evidence of the oath to throw on the prisoner the burden of proving that he was personated on that occasion by a stranger.¹ If the affidavit was actually used by the prisoner in the cause in which it was taken, proof of this fact will supersede the necessity of proving his handwriting.² Perjury cannot be assigned upon an answer in chancery unless the bill call for an answer under oath;³ but it may be committed by willfully giving false testimony of a material character before a grand jury.⁴

§ 694. 3. The Substance of the Matter Sworn to, Alleged to be False must be Shown;⁵ but it is not necessary to allege or prove all the testimony which the prisoner gave at the time specified.⁶ If there are several distinct assignments of perjury upon the same testimony, it is sufficient if any one of them be proved;⁷ and proof of the substance is sufficient, provided it is the substance and effect, the whole of what is contained in the assignment in question;⁸ but the defendant may show that, in another part of his testimony he corrected that part on which perjury is assigned.⁹

§ 695. Effect of a False Statement of Opinion, Belief, etc. — A

¹ *Rex v. Morris*, 2 Burr, 1189; *Rex v. Benson*, 2 Campb., 508; *Cook v. Dowling*, 3 Doug., 75; *Erver v. Ambrose*, 4 B. & Cres., 25; *Com. v. Warden*, 11 Met., 406; *Com. v. Warden*, 2 Met., 406.

² *Rex v. James*, 1 Show, 397.

³ *Silver v. State*, 17 Ohio, 365.

⁴ *State v. Schill*, 27 Iowa, 263.

⁵ *Roscoe Cr. Ev.*, 813.

⁶ 3 Greenl. Ev., § 193; *Rex v. Rowley*, Ry. & Moody, N. P. Cas., 299; *Ingraham v. Watkins*, 1 Dev. & Bat., 442; *Com. v. Knight*, 12 Mass., 274; *Dodge v. State*, 4 Zab., 455; *Campbell v. People*, 8 Wen., 636; *contra*, *Rex v. Jones*, 1 Peak Cas., 37; *Rex v. Dowlin*, 1 Peak Cas., 170.

⁷ *State v. Hascall*, 6 N. H., 352.

⁸ 2 Russ. on C., 658; *Rex v. Lecfe*, 2 Campb., 134; *Rex v. Munton*, 3 Car. & P., 498; *People v. Warner*, 5 Wen., 271; *State v. Ammond*, 3 Murphy, 123; *State v. Coffey*, N. C. T. R., 272; 2 Murphy, 320.

⁹ 3 Greenl. on Ev., § 193; 2 Russ. on C., 658; 3 Chitty Cr. L., 312b; *Rex v. Carr*, 1 Sid., 418.

person may be guilty of perjury who swears that he thinks or believes,¹ or that it is his opinion² that a fact is true which he knows to be false. And it has been said that it is perjury for a witness to swear to what he believes to be false, though in fact it is true;³ but under our statute the statement must be false or there is no perjury.⁴ If a person know that a fact exists, but falsely states on oath that "if the fact is so he does not know it," he is guilty of perjury; and will be considered equally guilty as if he swore absolutely that the fact did not exist.⁵

§ 696. 4. It must be Proved that the Matter Sworn to was Material to the Issue or Point in Question,⁶ otherwise there is no perjury,⁷ but questions which even circumstantially tend to maintain the issue⁸ or affect the amount of damages,⁹ or are put to a witness on his cross-examination for the purpose of testing his credit,¹⁰ are deemed material. It is not essential to constitute the crime of perjury that the fact sworn to should be material to the main issue in the case. It is sufficient if it is

¹ Roscoe Cr. Ev., 814; 3 Greenl. Ev., § 194; Miller's Case, 3 Wils., 427; Com. v. Cornish, 6 Bin., 249; Rex v. Schlisinger, 10 Ad. & El., N. S., 670; Reg. v. Beauvoir, 7 Car. & P., 17; Fergus v. Hoard, 15 Ills., 357; Patrick v. Smoke, 3 Strob., 147; Rex v. Pedley, 1 Leach C. C., 325; but see U. S. v. Passmore, 4 Dall., 378.

² 2 Bish. Cr. L., § 1040; Com. v. Thompson, 3 Dana, 301; Com. v. Brady 5 Gray, 78.

³ 2 Bish. Cr. P., § 923; 2 Whart. Cr. L., 2201; Com. v. Halsted, 2 Boston, L. R., 177.

⁴ R. S., 387, § 225, *ante* § 689.

⁵ Wilson v. Nations, 5 Yerg., 211.

⁶ Greenl. Ev., § 195; Com. v. Farley, Thatch. C. C., 654; State v. Hathaway, 2 N. & M., 118; Hinch v. State, 2 Missis., 158; Com. v. Knight, 12 Mass., 274; Campbell v. People, 8 Wen., 636; Conner v. Com., 2 Va. Cas., 30; Com. v. Grant, 116 Mass., 17.

⁷ 2 Arch. C. P. & Pl., 960; Pankey v. People, 1 Scam., 80; Morrell v. People, 32 Ill., 499; White v. State, 1 Sm. & M., 149.

⁸ 2 Arch. C. P. & Pl., 960; Chamberlain v. People, 23 N. Y., 85.

⁹ 2 Arch. C. P. & Pl., 961; Stephens v. State, 1 Swan Tenn., 157; State v. Norris, 9 N. H., 96; King v. Rhodes, 2 Ld. Raym., 887.

¹⁰ State v. Strat, 1 Murphy, 124; Com. v. Pollard, 12 Met., 225; Rex v. Aylett, 1 T. R., 63, 69; Com. v. Parker, 2 Cush., 212; Com. v. Knight, 12 Mass., 273; Reg. v. Overton, 3 Moody, 263.

material to a collateral issue before the court as if the accused swears to a false affidavit for a continuance.¹ It is perjury to swear falsely to what if assumed to be true will merely cause the particular proceeding to be abated.² Neither need it be sufficient alone to produce the wrong result: if it is a part of a link, it is sufficient.³ False evidence, whereby on the trial the judge is induced to admit other material evidence, is indictable as perjury, even though the latter evidence be afterwards withdrawn by counsel.⁴ Where evidence has been erroneously held to be material, and therefore wrongfully admitted, the better opinion seems to be that perjury may be assigned upon it.⁵ A witness who testifies falsely as to a material fact is guilty of perjury, though he was not a competent witness in the case and was especially inadmissible to prove the fact to which he testified.⁶ But if a person were improperly admitted as a witness, in order to give jurisdiction to the court, it being a court of special and limited jurisdiction, his false swearing is not perjury.⁷ Usually, the facts being proved, whether they were material or not, is a question of law.⁸

§ 697. **False Statement must be a Fact, not a Promise or an Opinion of Law.** — Since a promise of a witness cannot be material to any issue, a person does not commit perjury by mak-

¹ *State v. Shupe*, 16 Iowa, 36.

² *Reg. v. Mullaney*, Leigh & C., 593.

³ *State v. Dayton*, 3 Zab., 49; *Com. v. Pollard*, 12 Met., 225; *State v. Johnson*, 7 Blackf., 49; *State v. Lavalley*, 9 Missis., 334; *State v. Shupe*, 16 Iowa, 40; *Pratt v. Price*, 11 Wen., 127; *Howard v. Sexton*, 4 N. Y., 157.

⁴ *Reg. v. Philpotts*, 3 Car. & K., 135, 8 Eng. L. & Eq., 580.

⁵ *Reg. v. Philpotts*, 2 Den. C. C., 302; *Reg. v. Gibbon*, Leigh & C., 109; *State v. Hascall*, 6 N. H., 352; *State v. Clark*, 2 Tyler, 282; *People v. Phelps*, 5 Wen., 9; *State v. Lavalley*, 9 Missis., 334; *contra*, *Com. v. Pollard*, 12 Met., 225.

⁶ *Chamberlain v. People*, 23 N. Y., 85; *State v. Molier*, 1 Dev., 263; *Van Steinberg v. Kortz*, 10 John., 167; *Montgomery v. State*, 10 Ohio, 220; *Sharp v. Wilhite*, 2 Humph., 434; *Rich v. Newell*, 3 Yeates, 414; *State v. Keene*, 26 Me., 33; *contra*, *State v. Hamilton*, 7 Mo., 300; and see *Lamden v. State*, 5 Humph., 83.

⁷ 3 Greenl. Ev., § 191; *Smith v. Bouchier*, 2 Stra., 993; *Van Steinberg v. Kortz*, 10 John., 167.

⁸ *Steinman v. McWilliams*, 6 Bar., 170; *contra*, *Reg. v. Lavey*, 3 Car. & K., 26.

ing a mere promise or a promissory statement under oath, though he does not perform the promise and did not intend to perform it at the time he made it.¹ So the opinion of the witness upon a question of law cannot be material to any issue, therefore, he cannot commit perjury in giving a false opinion upon a question of law, as to the construction of a written instrument or otherwise.² But where the words of the witness were that a person named "did feloniously steal, take and carry away a rifle," etc., this charge of stealing was held to be a statement of fact, not of law.³

§ 698. 5. Proof that the Matter Sworn to by the Defendant, or Some Part of it, was False, is Indispensable,⁴ though it has been said that if a man swear to a fact of which he knows nothing he is guilty of perjury, whether it be true or false;⁵ and that if he swears to what he believes to be false, but which is in fact true, he may be convicted of perjury;⁶ but our statute seems to require that the statement should be false as well as corrupt.⁷ It is not necessary to prove that all the matters on which perjury is assigned are false; for if one distinct assignment of perjury be proved, the defendant ought to be found guilty.⁸

§ 699. Number of Witnesses Required. — It was formerly held that two witnesses were indispensable to prove that the matter sworn to was false, otherwise there would be only oath against oath,⁹ but now the true rule is that the adverse testi-

¹ 2 Bish. Cr. L., § 1032; 1 Hawks P. C., 431.

² Rex v. Crespigny, 1 Esp., 230; State v. Wolverton, 8 Blackf., 452; Com. v. Brady, 5 Gray, 78; *contra*, 2 Bish. Cr. L., § 1040.

³ Hoch v. People, 3 Mich., 552; State v. Lea, 3 Ala., 602.

⁴ Roscoe Cr. Ev., 822; Morrell v. People, 32 Ills., 501.

⁵ 1 Hawks P. C. C., 69, § 6; 2 Arch. C. P. & Pl., 965; 3 Greenl. Ev., § 198, n. 2; People v. McKinney, 3 Park. Cr. R., 510.

⁶ 3 Inst., 166; 2 Bish. Cr. L., § 1043.

⁷ R. S., 387, § 225; Pankey v. People, 1 Scam., 81.

⁸ Rhode's Case, 2 Ld. Raym., 886; State v. Hascall, 6 N. H., 352; Com. v. Johns, 6 Gray, 274; State v. Lindenberg, 13 Texas, 27; Dodge v. State, 4 Zab., 455; Rex v. Hill, Russ. & Ry., 190; Rex v. Ady, 7 Car. & P., 140; People v. Haynes, 11 Wen., 557; Com. v. Kneeland, 20 Pick., 206.

⁹ Crandall v. Dawson, 1 Gilm., 559; State v. Hayward, 1 Nott & McC., 546; 10 Mod., 393; Com. v. Pollard, 12 Met., 225; Rex v. Yeates, 1 C. & M., 132; Rex v. Boulter, 9 Eng. L. & Eq., 537.

mony of one witness with corroborating circumstances, such as to destroy the equilibrium and overcome the presumption of innocence, is sufficient to establish perjury.¹ The falsehood of the matter sworn to may be proved by the production of a public record or documentary or written evidence without the testimony of even one living witness.² Where the defendant has sworn to one thing on one occasion and the opposite thing on another occasion, one witness or other evidence is required³ and is sufficient⁴ to show which of the two oaths was false. Statements made by the defendant at other times, either verbal or written, may be given in evidence to show the falsity of the testimony in which perjury is charged, and are sufficient to convict when supported by one other witness to the falsity.⁵

§ 700. **As to what Facts More than One Witness Required.** — It is only in proof of the falsity of what was testified, that more evidence than that of a single witness is required, one witness alone being sufficient to prove all the other allegations in the indictment.⁶

§ 701. **6. It must be Proved that the False Statement was Willfully and Corruptly Made;**⁷ for if it appears that the testi-

¹ *Crandall v. Dawson*, 1 Gilm., 559; *Rex v. Lee*, 2 Russ. on C., 545; *Rex v. Gardiner*, 2 Moody C. C., 95; *Rex v. Mayhew*, 6 Car. & P., 315; *State v. Raymond*, 20 Iowa, 583.

² *Crandall v. Dawson*, 1 Gilm., 559; *U. S. v. Wood*, 14 Pet., 420; *State v. Moliere*, 1 Dev., 213; *Rex v. Champeny*, 2 Lewin, 258.

³ *Reg. v. Hughes*, 1 Car. & K., 519; *Rex v. Knill*, 5 Barn. & Ald., 929; *King v. Harris*, 5 Barn. & Ald., 526; *State v. J. B.*, 1 Tyler, 260; *Reg. v. Wheatland*, 8 Car. & P., 238; *Dodge v. State*, 4 Zab., 455; *contra*, *People v. Burden*, 9 Barb., 467.

⁴ *Rex v. Knill*, 5 Barn. & Ald., 526; *Reg. v. Wheatland*, 8 Car. & P., 258; *Jackson's Case*, 1 Lewin, 270.

⁵ *Dodge v. State*, 4 Zab., 455.

⁶ 3 Greenl. Ev., § 198; *Com. v. Pollard*, 12 Met., 225; *Rex v. Lee*, 2 Russ. on C., 650; *State v. Hayward*, 1 Nott & McC., 546; *State v. Wood*, 17 Iowa, 18; *contra*, *State v. Howard*, 4 McCord, 159; see *Reg. v. Roberts*, 2 Car. & K., 607.

⁷ *Wyld v. Cookman*, Cro. Eliz., 492; *Rex v. Smith*, 2 Show, 165; *U. S. v. Passmore*, 4 Dall., 378; *Respublica v. Newell*, 3 Yates, 407; *Thomas v. Com.*, 2 Robinson, 795; *Com. v. Cook*, 1 Robinson, 729; *State v. Garland*, 3 Dev., 114.

mony was given by surprise,¹ mistake² or inadvertence,³ and not willfully, it is not perjury. The corruption required in perjury may be negatived by showing that the party testified honestly under legal advice.⁴ In proof that the testimony was willfully false, evidence may be given showing animosity and malice in the defendant against the prosecutor,⁵ or that the motives which actuated him were corrupt; as, for instance, that his object in making the oath was to coerce the settlement of a civil claim.⁶ If false testimony given in a cause was afterwards retracted in a cross-examination or a subsequent stage of the trial, yet the indictment will be supported by proof that the false testimony was willfully and corruptly given, notwithstanding the subsequent retraction.⁷

§ 702. *Defense.* — It is no defense to an indictment for perjury that the prisoner was intoxicated;⁸ but it is a defense that the suit in which the perjury is charged to have been committed had abated by the death of the party,⁹ or the like.¹⁰

7. RESISTANCE TO OFFICERS.

§ 703. *In Executing Process.* — “If any person shall knowingly and willfully obstruct, resist or oppose any sheriff, dep-

¹ 1 Hawks P. C., 429, § 2; 3 Greenl. Ev., § 201; 2 Bish. Cr. L., § 1045; U. S. v. Conner, 3 McLean, 573.

² Reg. v. Muscott, 10 Mod., 192; Rex v. Deveauvior, 7 Car. & P., 17; Rex v. Crespigny, 1 Esp. R., 280; Rex v. Milling, 5 Mod., 348; State v. Wolverton, 8 Blackf., 452.

³ U. S. v. Stanley, 6 McLean, 409; Jesse v. State, 20 Ga., 156, 169; State v. Chamberlain, 30 Vt., 559.

⁴ Hood v. State, 44 Ala., 81; U. S. v. Conner, 3 McLean, 583; U. S. v. Stanley, 6 McLean, 409; Steinman v. McWilliams, 6 Bar., 178.

⁵ Rex v. Munton, 3 Car. & P., 498.

⁶ State v. Hascall, 6 N. H., 352.

⁷ Martin v. Mills, 4 Mo., 47.

⁸ People v. Willey, 2 Park. Cr. R., 19.

⁹ Rex v. Cohen, 1 Stark. R., 511.

¹⁰ Paine's Case, Yelv., 111; Boling v. Luther, 2 Tayl., 202; State v. Alexander, 4 Hawks, 182; State v. Hayward, 1 Nott & McC., 546; Com. v. White, 8 Pick., 453; State v. Furlong, 26 Me., 69; Muir v. State, 8 Blackf., 154; Lamden v. State, 5 Humph., 83.

uty sheriff, coroner, constable, or other officer of this state, or other person duly authorized, in serving or attempting to serve any lawful process or order of any court, judge or justice of the peace, or any other legal process whatsoever, or shall assault or beat any sheriff, deputy sheriff, coroner, constable or other officer, or person duly authorized, in serving or executing, or attempting to serve or execute, any process or order aforesaid, or for having served or executed, or attempted to serve or execute, the same, every person so offending shall be fined not exceeding five hundred dollars, and imprisoned not exceeding one year."¹

STATEMENT OF THE OFFENSE OF RESISTING AN OFFICER.²

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, unlawfully, knowingly and willfully did obstruct, resist and oppose the said A. B., then and there being a constable³ in and for said county, in his, the said A. B.'s attempting in the due execution of his duty as such constable⁴ to serve a lawful process, to wit, a warrant in behalf of the Peo-

¹ R. S., 389, § 244. It is not a punishable offense under this section to resist a peace officer while attempting to make an arrest without a warrant; *State v. Lowell*, 23 Iowa, 304; but see *Cpm. v. Lee*, 107 Mass., 207; or to resist an overseer of highways in the discharge of his duties; *State v. Putnam*, 35 Iowa, 561. For statute relating to resisting the execution of search warrants for records, etc., see R. S., 384, § 218, *ante* § 152; and for statute relating to refusing to join posse, see R. S., 389, § 245, *ante* § 200.

² For forms of indictments, see *McQuoid v. People*, 3 Gilm., 77; *Bowers v. People*, 17 Ills., 373; *State v. Freeman*, 8 Iowa, 429.

³ It is not necessary to aver that the officer was legally elected and duly qualified; still if the averment is made it has been held so far descriptive in its nature as to require the prosecutor to prove it on the trial. *State v. Copp*, 15 N. H., 212. The words "then and there being constable of the said county" have been held to be sufficient. *State v. Hooker*, 17 Vt., 658; *Bowers v. People*, 17 Ills., 373; but see *Rountree v. United States*, 1 Pin. Wis., 59.

⁴ The words "lawful process" are necessary; *State v. Burt*, 25 Vt., 373; *Cantrill v. People*, 3 Gilm., 356; *State v. Harley*, 2 Strob., 73; *U. S. v. Stowell*, 2 Curt. C. C., 153; *State v. Beasom*, 4 N. H., 367, and sufficiently aver the jurisdiction of the officer issuing the process. *McQuoid v. People*, 3 Gilm., 79; *Bowers v. People*, 17 Ills., 373; *State v. Dickerson*, 24 Mo., 365; *contra*, *State v. Tuell*, 6 Blackf., 344, and contain a sufficient description of it without setting it out in the very words; *McQuoid v. People*, 3 Gilm., 76; *Bowers v. People*, 17 Ills., 373; *Sticker v. State*, 13 Ark., 397; *contra*, *State v. Henderson*, 15 Mo., 486.

ple of the State of Illinois against the said C. D., issued on the — day of —, A. D. 18—, in said county, by L. M., then and there at the time and place last aforesaid being a justice of the peace in and for said county, duly qualified and commissioned,¹ contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 704. What not a Defense to an Indictment for Resisting an Officer — Threatening to Resist. — The better opinion seems to be, though the authorities are conflicting upon the question,² that third persons are indictable for resisting an officer *de facto*,³ because the law does not permit them to test in this way the legality of the claim to office of those who hold and commonly exercise the office under an apparent right, but provides a proceeding by *quo warranto* for the purpose of testing such right.⁴ One who knowingly obstructed a public officer in the discharge of his duty cannot defend himself when indicted by showing that his object was the personal chastisement of the officer.⁵ A mere threat of resistance to a lawful process is not an offense under the statute; but if where an officer proceeds with his process to the land and is about to execute it, a threat is made by a person forcibly retaining the possession, accompanied by the exercise of force, or having the capacity to employ it, and the officer does not execute the writ, the offense is complete.⁶

¹ It is not necessary to describe the particular mode of resisting the officer; *McQuoid v. People*, 3 Gilm., 76; *U. S. v. Bachelder*, 2 Gallis, 15; *State v. Copp*, 15 N. H., 212; *Lamberton v. State*, 11 Ohio, 282; *Farris v. State*, 3 Ohio S., 159; *contra*, *State v. Downer*, 8 Vt., 424; *State v. Burt*, 25 Vt., 373; or to state the place at which the process was delivered to the officer, *State v. Hooker*, 17 Vt., 658; or to allege that the officer informed the defendant that he acted under authority of a warrant; *State v. Freeman*, 8 Iowa, 428.

² 1 Bish. Cr. L., § 464.

³ *People v. Hopson*, 1 Denio, 574; *Taylor v. Skrine*, 2 Const. S. C., 696; *People v. Stevens*, 5 Hill, 630; *Com. v. Dugan*, 12 Met., 233; *Rex v. Gordon*, 1 Leach, 515; *Reg. v. Newton*, 1 Car. & K., 469; *Muir v. State*, 8 Blackf., 154; *State v. Boies*, 34 Me., 235; *Heath v. State*, 36 Ala., 273; *Com. v. Kirbey*, 2 Cush., 577.

⁴ *People v. Stevens*, 5 Hill, 630; *McKim v. Somers*, 1 Pa., 297; *Aulimer v. Governor*, 1 Texas, 654; *In re Boyle*, 9 Wis., 264.

⁵ *U. S. v. Keen*, 5 Mason, 453.

⁶ *U. S. v. Lowery*, 3 Wash. C. C., 169.

§ 705. **Evidence.** — A justice of the peace who issued a civil process is a competent witness to prove his official character upon the trial of an indictment for resisting the process.¹ It is not necessary to produce any record or written evidence of the election, appointment, or qualification of a constable or police officer, it being sufficient in proof that he was known to act as such officer.² It must be shown that the process was lawful;³ therefore, on the trial for an assault and battery in resisting the jailer, it was held that the prosecutor must produce the mittimus to show that the jailer had the legal right to retain the defendant.⁴ It must appear that the defendant had notice or knew the officer's business.⁵

§ 706. **Defense — Want of Authority of Officer.** — If an officer or person endeavoring to make an arrest or enter a house has no legal authority for that purpose, or if in certain cases he abuses such authority and does more than he is authorized to do, or if it turns out in the result that he has no right to enter,⁶ then the party about to be imprisoned, or whose house is about to be illegally entered, may resist the illegal imprisonment or entry by self-defense, not using any deadly or dangerous weapon, or any more force than is necessary, and may escape or be rescued, or even break prison,⁷ and others may assist him in so doing.⁸

§ 707. **Continued — Illegal Process, etc.** — A person in the protection of his person or property may forcibly resist an officer unless the latter is acting under process against him. As if

¹ *Oliver v. State*, 17 Ark., 508.

² 2 Bish. Cr. P., §§ 824, 885; *Com. v. Kane*, 108 Mass., 473; *Com. v. Tobin*, 108 Mass., 426; *Rex v. Gordon*, 1 Leach, 515; *Butler v. Ford*, 1 C. & M., 162.

³ Barb. Cr. L., 82; *Roscoe Cr. Ev.*, 625, 626; *People v. Muddoon*, 2 Park. Cr. R., 13; *McQuoid v. People*, 3 Gilm., 76; *Bowers v. People*, 17 Ills., 373.

⁴ *People v. Muddoon*, 2 Park. Cr. R., 13; and see *Rex v. White, Cald.*, 183; *Boyd v. State*, 17 Ga., 194; *State v. Shaw*, 3 Ired., 20.

⁵ 1 Hale P. C., 470.

⁶ *Cooke v. Birt*, 5 Taunt., 765; *Rex v. Watts*, 1 B. & Adol., 166.

⁷ 1 East P. C., 295; 1 Hale P. C., 457, 464, 465, 583, 599.

⁸ *Rex v. Osmer*, 5 East, 304, 308; 1 Smith R., 555; *U. S. v. Gay*, 2 Gallison, 359, 361.

an officer attempts to take the property of one person on an execution against another he may be forcibly resisted.¹ Where one is justified in resisting an officer on the ground of the officer's being without a warrant, or having only an imperfect one, his justification is effectual equally whether he knew of the omission or not.² There must be an active obstruction, resistance or opposition to bring a case within the statute. Merely taking charge of a debtor's property, keeping it out of the officer's view, and refusing when called on by the officer to produce it, is not enough.³ If a man takes from a justice of the peace a writ and refuses to give it back, thereby stopping the proceedings in the case, he does not commit the statutory offense, whatever may be his common-law liability.⁴

8. WITNESSES.

§ 708. **Provisions of the Statute.** — "Whoever, by hiring, persuasion or otherwise, induces any witness in any criminal cause, or any person having knowledge of any fact tending to show the guilt or innocence of any person suspected or charged with having committed a crime to leave the state, or secrete himself, so that he cannot be produced as a witness at any examination or trial of the person so suspected or charged, shall be fined not exceeding one thousand dollars, or confined in the county jail not exceeding one year, or both."⁵

¹ *Wentworth v. People*, 4 Scam., 550; *Oliver v. State*, 17 Ark., 508; *contra*, *State v. Richardson*, 38 N. H., 208.

² *Foster*, 311; 1 East P. C., 325.

³ *Crumpton v. Newman*, 12 Ala., 199.

⁴ *State v. Lovett*, 3 Vt., 110; *State v. Hailey*, 2 Strob., 73; *State v. Henderson*, 15 Mo., 486; *State v. Noyes*, 25 Vt., 415.

⁵ R. S., 393, § 272. At common law it was indictable to dissuade or otherwise hinder a witness from appearing before a court and testifying: *Russ. on C.*, 183; 1 Bish. Cr. L., § 468; *State v. Keyes*, 8 Vt., 57; *State v. Early*, 3 Harring., 562; because it was calculated to pervert public justice; *State v. Carpenter*, 20 Vt., 9.

STATEMENT OF THE OFFENSE OF INDUCING A WITNESS TO BE ABSENT
ON THE TRIAL OF A CRIMINAL CAUSE.

(*Commence as in form on page 35*) that C. D., on, etc., at., etc., in the said county, unlawfully did induce one E. F., then and there being a witness¹ in a criminal cause (wherein one G. H. had before that time, *to wit.*, on the — day of —, A. D. 18—, in the circuit court of the said county, been duly indicted² for the crime of larceny, and was then, at the time first above mentioned, and there in the said criminal cause duly charged with having committed the said offense, which said criminal cause was then, at the time first above mentioned, and there pending in the said court and undetermined) to leave the said state of Illinois, so that he could not be produced as a witness on the trial of the said G. H., for the said crime so charged as aforesaid, by then, at the time first above mentioned, and there persuading the said E. F. so to leave the said state of Illinois; the said E. F., then, at the time first above mentioned, and there having knowledge of certain facts tending to show the guilt of the said G. H. of the said crime,³ contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 709. **Evidence.** — The effect of the act and intent of the offender is the same, whether the witness has been or is about to be served with a subpoena, or about to attend in obedience to a voluntary promise. Any attempt in either case is equally criminal and equally merits punishment.⁴ It is not necessary to prove the materiality of the witness induced to leave.⁵

¹ It is not necessary to allege in whose behalf the witness was summoned or that his testimony was material. *Com. v. Reynolds*, 14 Gray, 87.

² The indictment need not be recited. *State v. Carpenter*, 20 Vt., 9.

³ The indictment need not conclude "to the obstruction and hindrance of public justice." *Com. v. Reynolds*, 14 Gray, 87.

⁴ *State v. Keyes*, 8 Vt., 57; *State v. Carpenter*, 20 Vt., 9.

⁵ *State v. Early*, 3 Harring., 562.

SECTION IX.

OFFENSES AGAINST THE PUBLIC PEACE AND TRANQUILLITY.

- § 710. Extortion by Threats—Punishment.
- 711. Evidence of Making the Threats.
- 712. The Threat must be to Accuse of a Crime.
- 713. Evidence of an Intent to Extort Money, etc.
- 714. Intimidation by Combinations, etc.
- 715. Entering Premises to Intimidate.
- 716. Compelling Confession.
- 717. Compelling to Leave.
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- 719. Of Jurors and Others.
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- 740. Suppression of Unlawful Assemblies.
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- 743. Injuries to Property by Unlawful Assemblies

1. EXTORTION BY THREATS.

§ 710. **Punishment.** — “Whoever, either verbally or by written or printed communication, maliciously threatens to accuse another of a crime or misdemeanor, or to expose or publish any of his infirmities or failings, with intent to extort money, goods, chattels, or other valuable thing, or threatens to maim, wound, kill, or murder, or to burn or destroy his house or other property, or to accuse another of a crime or misdemeanor, or expose or publish any of his infirmities or failings, though no money, goods, chattels, or other valuable thing be demanded, shall be fined in a sum not exceeding five hundred dollars, and imprisoned not exceeding six months.”¹

STATEMENT OF THE OFFENSE OF EXTORTION BY THREATS.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, by² a written communication unlawfully, knowingly and maliciously did threaten to accuse the said E. F. of a certain crime called rape, *to wit.*, of feloniously, forcibly and violently making an assault in and upon G. H., being then a female, and feloniously, forcibly, and violently ravishing and carnally knowing the said G. H. against her will, with intent thereby to extort money from the said E. F., which said communication is as follows (*insert exact³ copy of the communication*), contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

¹ R. S., 365, § 93. At common law it was criminal to extort money from one by a threat to indict him for perjury. *Reg. v. Woodward*, 11 Mod., 137; *State v. Bruce*, 24 Me., 71. But the United States tribunals have no jurisdiction to punish common-law offenses without express authority from some act of Congress. *U. S. v. Worrall*, 2 Dall., 384.

² An indictment must clearly and directly allege the several facts which constitute the statutory offense, *Rex v. Dunkley*, 1 Moody, 90; following the terms of the statute, 2 Bish. Cr. P., § 1027; *Rex v. Abgood*, 2 Car. & P., 436.

³ The written communication must be set out in the exact words and figures, and so proved on the trial. 2 Bish. Cr. P., § 1026; *Rex v. Loyd*, 2 East P. C., 1122, 1124. But where the indictment is for verbally threatening, it is sufficient to set out the substance of the words used. *Com. v. Moulton*, 108 Mass., 307; *Com. v. Dorus*, 108 Mass., 489.

§ 711. **Evidence — 1. Proof of Making the Threats is Indispensable.** If the communication containing the threat is written or printed it must be produced or its absence accounted for, and be proved to have been received by the person threatened,¹ or to have been published in some way. Under the English statute it was held not to be sufficient to prove it to be in the handwriting of the defendant without proof that it had been sent or delivered to the prosecutor.² It is sufficient evidence of threatening to prove that the defendant dropped a letter containing threats directed to the prosecutor into the prosecutor's premises, where it was likely to be found, either by the prosecutor himself, or by some person who would deliver it to him;³ or that the defendant left such letter at the gate in the road, near the prosecutor's house, where it was found by a person passing, who forwarded it to the prosecutor, and being left in the steward's room, he opened it and gave it to a constable, and the constable showed it to the prosecutor;⁴ or that the prisoner sent it to another person, with intent that such person should send or deliver it to the prosecutor;⁵ or that the defendant left it in any place with intent that it should be found and ultimately delivered to the party threatened.⁶ Threatening to complain to a police officer against a man for committing a crime, is indictable as a threat to accuse him of it.⁷ An indictment for threatening to accuse another of crime, with intent thereby to extort money, which avers that the defendant accused a man of seducing a woman, and said that she would swear to it and that her oath would send him to state-prison, but that if he would pay the defendant a thousand dollars the defendant would let him go, is sufficient.⁸

§ 712. **2. The Threat must be to Accuse Another of a Crime or**

¹ 2 Arch. C. P. & Pl., 256.

² *Rex v. Howe*, 7 Car. & P., 268.

³ *Rex v. Wagstaff*, Russ. & Ry., 398.

⁴ *Rex v. Grimwade*, 1 Car. & K., 592.

⁵ *Rex v. Paddle*, Russ. & Ry., 484; see *Rex v. Jones*, 2 Car. & K., 398.

⁶ *Rex v. Grimwade*, 1 Car. & K., 593.

⁷ *Com. v. Carpenter*, 108 Mass., 15.

⁸ *Com. v. Dorus*, 108 Mass., 488.

Misdemeanor. — At common law a threat, to be indictable, must be such as a firm and prudent man might not have been expected to resist,¹ and under our statute threatening to prosecute another in a civil or penal action probably would not be indictable.² If it does not appear in the written or printed communication itself of what offense the prisoner threatened to accuse the prosecutor, it has been held that parol evidence might be admitted to explain it and to show what offense was intended.³

§ 713. **3. Under the First Clause of the Statute Proof of an Intent to Extort Money, Goods, Chattels or Other Valuable Thing is indispensable.** And the intent proved must not vary from that charged; for if the allegation is that the threat was made with intent to extort money, and it appears in evidence that the intent was to procure the delivering up of a bill of exchange, the variance is fatal.⁴ Other communications and subsequent letters from the prisoner to the party threatened may be given in evidence for the purpose of showing the intent.⁵

2. INTIMIDATION.

§ 714. **By Combinations, etc.** — “If any two or more persons shall combine, for the purpose of depriving the owner or possessor of property of its lawful use and management, or of preventing, by threats, suggestions of danger, or any unlawful means, any person from being employed by or obtaining employment from any such owner or possessor of property, on such terms as the parties concerned may agree upon, such person so offending shall be fined not exceeding five hundred

¹ *Rex v. Southerton*, 2 East R., 140; and see *Reg. v. Woodward*, 11 Mod., 137, 6 East R., 133, 134.

² *Rex v. Southerton*, 2 East R., 140.

³ *Rex v. Tucker*, Ry. & M., 134.

⁴ *Rex v. Major*, 2 East P. C., 1124.

⁵ *Rex v. Robinson*, 2 East P. C., 1110, 1124.

dollars, or confined in the county jail not exceeding six months.”¹

STATEMENT OF THE OFFENSE OF COMBINING TO PREVENT A PERSON
FROM OBTAINING EMPLOYMENT.

(*Commence as in form on page 35*) that C. D., E. F., and divers other persons to the said A. B. unknown, on the — day of —, A. D. 18—, at, etc., in said county, unlawfully did among themselves conspire, combine, confederate and agree together, for the unlawful purpose of preventing by threats, suggestions of danger and other unlawful means, G. H., I. J. and K. L., from obtaining employment from the said A. B., then and there being the owner of a certain building there situate, called a brewery, to work in the said brewery on such terms as the said G. H., I. J. and K. L. might agree upon with the said A. B., against the form of the statute in such case made and provided (*conclude as in the form on page 35*).

§ 715. **Entering Premises to Intimidate.** — “Whoever enters a coal bank, mine, shaft, manufactory, building or premises of another, with intent to commit any injury thereto, or by means of threats, intimidation, or riotous or other unlawful doings, to cause any person employed therein to leave his employment, shall be fined not exceeding five hundred dollars, or confined in the county jail not exceeding six months, or both.”²

STATEMENT OF THE OFFENSE OF ENTERING COAL BANK WITH INTENT
TO INJURE IT.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, unlawfully did enter a certain coal bank there situate, then and there being in the possession of and owned by the said A. B., with intent to commit an injury thereto, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

¹ R. S., 376, § 158 At common law combinations among laborers and workmen to raise the price of wages were indictable. *Rex v. Bykerdike*, 1 Moody & R., 179; *Rex v. Mawberry*, 6 T. R., 619; *Rex v. Eccles*, 1 Leach, 274, 276; *Reg. v. Hewit*, 5 Cox C. C., 162; *Reg. v. Duffield*, 5 Cox C. C., 404; *Collins v. Hayte*, 50 Ills., 355; and see *Com. v. Hunt*, 4 Met., 111; *People v. Fisher*, 14 Wen., 19; *Hooker v. Vanderwater*, 4 Denio, 349; *Stanton v. Allen*, 5 Denio, 434.

² R. S., 376, § 160.

§ 716. **Compelling Confession.** — “If two or more persons shall commit an assault and battery on, or shall imprison another within this state, for the purpose of obtaining a confession or revelation tending to criminate the person assaulted, or any other person, or shall assault and batter or imprison another on account of a refusal of such person to make such confession or revelation, the person so offending shall be imprisoned in the penitentiary not less than one year nor more than three years.”¹

STATEMENT OF THE OFFENSE OF COMPELLING A CONFESSION.

(*Commence as in form on page 35*) that C. D., E. F., and divers other persons to the said A. B. unknown, on, etc., at, etc., in the said county, feloniously and unlawfully did commit an assault and battery on the said A. B., by then and there unlawfully beating the said A. B., for the purpose of obtaining a confession from the said A. B., tending to criminate him the said A. B., of the crime of larceny, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 717. **Compelling to Leave.** — “If two or more persons shall actually do an unlawful act, with force or violence against the person or property of another, with an intent thereby to cause such person to leave the state or county against his will, the person so offending shall be imprisoned in the penitentiary not less than one year nor more than three years.”²

STATEMENT OF THE OFFENSE OF COMPELLING A PERSON TO LEAVE.

(*Commence as in form on page 35*) that C. D. and E. F., on, etc., at, etc., in the said county, feloniously did actually do an unlawful act with force and violence against the person of G. H., *to wit.*, feloniously did then and there tar and feather, beat, strike and kick the said G. H. with force and violence, with intent thereby to cause the said G. H. to leave the said State of Illinois against his will, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 718. **Mock Trial.** — “If two or more persons shall, without authority of law, assemble and try another for any real or pretended offense, or for being a person of bad repute, with

¹ R. S., 376, § 161.

² *Id.*, § 162.

intent to intimidate or inflict any injury or punishment upon the person so tried, the persons so offending shall be imprisoned in the penitentiary not less than one nor more than three years.”¹

STATEMENT OF THE OFFENSE OF PARTICIPATING IN A MOCK TRIAL.

(*Commence as in form on page 35*) that C. D. and E. F., on, etc., at, etc., in the said county, feloniously did without authority of law assemble and try one G. H. for the pretended offense of rape, with intent to intimidate and inflict a punishment upon the said G. H., contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 719. Of Jurors and Others. — “If two or more persons shall actually do an unlawful act, with force or violence, against the person or property of any grand or petit juror, witness or member of a *posse comitatus*, on account of any act done by him, in obedience to a duty required of him by law, or to prevent the performance of any such act, the person so offending shall be imprisoned in the penitentiary not less than one year nor more than three years.”²

STATEMENT OF THE OFFENSE OF INTIMIDATING A JUROR.

(*Commence as in form on page 35*) that C. D. and E. F., on, etc., at, etc., in the said county, feloniously did actually do an unlawful act with force and violence against the property of the said A. B., *to wit.*, did then and there feloniously and with force and violence stab and kill the horse of the said A. B. on account of the said A. B. having before that time, *to wit.*, on the — day of — A. D. 18 —, in a certain cause pending in the circuit court of the said county, wherein the said C. D. was plaintiff and one G. H. was defendant, and the said A. B. was at the time aforesaid a juror duly sworn to try the issue in the said cause, as such juror agreed to a verdict against the said C. D., which said act of agreeing to the said verdict was done by the said A. B. in obedience to a duty required of him as such juror by law, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 720. By Threats. — “If one or more persons shall threaten violence to the person or property of another, for the purpose of obtaining a confession of crime, or for the purpose of caus-

¹ R. S., 376, § 163.

² *Id.*, § 164.

ing such person to leave the state, or shall threaten violence to the person or property of any grand or petit juror, witness, or a member of a *posse comitatus*, on account of any act done by him in obedience to a duty required of him by law, or to prevent the performance of any such act, the person or persons so offending shall be severally fined not exceeding one hundred dollars, or confined in the county jail not more than three months.”¹

STATEMENT OF THE OFFENSE OF THREATENING ANOTHER TO OBTAIN A CONFESSION.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, unlawfully did threaten violence to the person of the said A. B., *to wit.*, that he would unlawfully then and there beat, bruise and maim the said A. B. for the purpose of obtaining a confession of crime from the said A. B., contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

3. LIBEL.

§ 721. **Defined.** — “A libel is a malicious defamation expressed either by printing, or by signs or pictures, or the like, tending to blacken the memory of one who is dead, or to impeach the honesty, integrity, virtue or reputation, or publish the natural defects of one who is alive, and thereby to expose him to public hatred, contempt, ridicule, or financial injury.”²

§ 722. **Punishment.** — “Every person, whether writer or publisher, convicted of libel, shall be fined not exceeding five hundred dollars, or confined in the county jail not exceeding one year.”³

§ 723. **Justification.** — “In all prosecutions for libel, the truth, when published with good motives, and for justifiable ends, shall be a sufficient defense.”⁴

¹ R. S., 377, § 165.

² Id., 378, § 177.

³ Id., § 178; *Wilson v. Noonan*, 23 Wis., 105.

⁴ R. S., 378, § 179.

STATEMENT OF THE OFFENSE OF LIBEL.

(Commence as in form on page 35) that C. D., on, etc, at, etc., in the said unty,¹ unlawfully and maliciously² did write, print, and publish a certain lse, scandalous, malicious, defamatory libel of and concerning³ the said B., which said libel is as follows:⁴ "To A. B., scoundrel" (*meaning the said A. B.*). "It may not be amiss to acquaint you" (*meaning the said A.*) "as the time draws near, you" (*meaning the said A. B.*) "may be pre-erring yourself" (*again meaning the said A. B.*) "for a trial for stealing e turkeys out of my" (*meaning his, the said C. D.'s*) "yard, when I" (*meaning himself, the said C. D.*) "hope to see you" (*meaning the said A. B.*) "sing a neck psalm, and perish according to law. Subscribed, C. D." (*meaning himself, the said C. D.*), tending to impeach the honesty, integrity,

¹ It is not necessary to insert the words "with force and arms." *Rex v. Burks*, 7 T. R., 4.

² The defendant's malicious intent must be shown; but previous to the statute the words "falsely or wrongly" were deemed sufficient, without saying "maliciously." *Barb. Cr. L.*, 237; *Craft v. Borte*, 1 Saund., 242a, n. 2.

³ It must be stated that the libel was "of and concerning" the prosecutor. *Rex v. Burks*, 7 T. R., 4; *Rex v. Marsden*, 4 M. & S., 164; *Rex v. Ardett*, 4 Barn. & Ald., 314; *State v. Brownlow*, 7 Humph., 63.

⁴ An allegation in the words "according to the purport and effect, and in substance as follows" has been held to be insufficient. *Com. v. Wright*, 1 Ash., 46; see also *State v. Goodman*, 6 Rich., 387; *Com. v. Tarbox*, 1 Cush., . The libel must purport to be and be set out in exact terms. Merely stating it in substance and effect will not be sufficient. *Wright v. Clements*, Barn. & Ald., 508; *State v. Brownlow*, 7 Humph., 63; 3 Dowl. & Ryl., 9; *Rex v. Beare*, 1 Ld. Raym., 414; *Com. v. Sweeny*, 10 Serg. & R., 173; *contra*, *Whiting v. Smith*, 13 Pick., 364. But the parts which are most offensive may be selected, *Rex v. Bear*, 2 Salk., 417, and the balance omitted the sense is not thereby changed, *Cartwright v. Wright*, 1 Dowl. & Ryl., 0; 5 Barn. & Ald., 615. If the libel be in a foreign language the origin must be set forth, and then a correct translation. *Zenobio v. Axtell*, 6 R., 162; 1 Saund., 242.

⁵ Where the words are in themselves plain, and their application is not doubtful, no innuendo is necessary. *Rex v. Home*, Cowp., 672; *Woolworth Meadows*, 5 East, 463, 469. But where the meaning is doubtful or not obviously libelous, the meaning of the words must be explained. 3 Chitty Cr. L., 875a; 2 Bish Cr. P., § § 793, 794, n. 5; *Gosling v. Morgan*, 8 Casey, 273.

⁶ If the date and signature at the end of the libel are omitted, this creates a variance. *Com. v. Hamon*, 2 Gray, 289.

⁷ Where parts are selected they should be set forth thus: "In a certain part of which said libel there were and are contained certain false, wicked, malicious, scandalous, seditious and libelous matters of and concerning, &c., according to the tenor and effect following, that is to say. And in a certain other part, etc." *Tabart v. Tipper*, 1 Camp., 350.

virtue, and reputation of the said A. B.,¹ and thereby to expose him, the said A. B., to public hatred, contempt, and ridicule (*conclude as in form on page 35*).

§ 724. **What a Libel.** — An indictment lies for publishing words which contain that sort of imputation which is calculated to vilify a man and bring him into hatred, contempt or ridicule, though the words impute no punishable crime.² Thus to write that a man is a swindler or a hypocrite, or an itchey old toad,³ or a drunkard,⁴ or a cuckold and a tory,⁵ or is insane,⁶ or that a woman has been guilty of fornication,⁷ is libelous and indictable.⁸ So it is indictable to charge a man with a gross want of feeling,⁹ or with wanting discretion,¹⁰ or with having committed any crime.¹¹ It is libelous to write concerning a man, "I look upon him as a rascal and have watched him for many years,"¹² or that "he is thought no more of than a thief and a counterfeiter."¹³ A publication charging a malster with using filthy and disgusting water in the malting of grain for brewing, is libelous.¹⁴ To publish of a member of congress that he is a fawning sycophant, a mis-

¹ The residence and addition of the person libeled need not be set out in an indictment. *State v. Barns*, 32 Me., 530. Neither need his profession or occupation. *Com. v. Varney*, 10 Cush., 402. If, however, he is an official person, and the libel is in respect of his office, this official position must be stated in the allegation. *Rex v. Hatfield*, 4 Car. & P., 244.

² 2 Arch. C. P. & Pl., 204; *State v. Farley*, 4 McCord, 317; *Com. v. Chapman*, 13 Met., 68; *State v. Henderson*, 1 Rich., 179; *Rex v. Pownell*, 2 W. Kel., 58; *Steel v. Southworth*, 9 John., 214.

³ 2 Arch. C. P. & Pl., 204; *Thorley v. King*, 4 Taunt., 355.

⁴ *Giles v. State*, 2 Ga., 276.

⁵ *Id.*

⁶ *Rex v. Harvey*, 2 B. & Cres., 257; *Southworth v. Stevens*, 10 John., 443.

⁷ 3 Salk., 190; 2 Campb., 142; and see *State v. Avery*, 7 Conn., 267.

⁸ *Barb. Cr. L.*, 232.

⁹ *Weaver v. Loyd*, 1 Chitty R., 480, 4 Dowl. & Ryl., 230.

¹⁰ 2 Arch. C. P. & Pl., 204.

¹¹ *Whart. Cr. L.*, § 2527; *State v. White*, 7 Ired., 180; *Hillhouse v. Dunning*, 6 Conn., 139; *Walker v. Winn*, 8 Mass., 248.

¹² *Williams v. Carnes*, 4 Humph., 9.

¹³ *Nelson v. Musgrave*, 10 Mo., 648.

¹⁴ *White v. Delevan*, 17 Wen., 49.

representative in Congress, and a groveling office-seeker, and has abandoned his post in Congress, is libelous.¹ So it is libelous to publish a correct account of judicial proceedings if accompanied with comments and insinuations tending to asperse a man's character;² and if the account be highly colored or false,³ or does not set forth all the material evidence,⁴ it is libelous. In several instances the publication of matters of a criminal charge contained in an affidavit, deposition or other *ex parte* evidence in a judicial proceeding has been held to be indictable, because tending to excite undue prejudice against the accused.⁵ It has been held that a correct account of the transactions of a judicial tribunal cannot be published when it contains matter of scandalous, blasphemous or immoral tendency.⁶ But as a general rule when a case has been finally disposed of, a correct publication of the proceedings is not libelous.⁷ It is libelous to call a woman a hermaphrodite,⁸ or to publish of a coachman that he has been guilty of gross misconduct, and insulted two females in a barbarous manner,⁹ or to give a printed account of a ludicrous marriage between an actress and a married man,¹⁰ or to publish that a person mentioned voted twice for the officers on the same ballot at a state election,¹¹ or to publish of one that he is a hireling murderer,¹² or of a wife that her husband was aston-

¹ Thomas v. Croswell, 7 John., 264.

² Com. v. Blanding, 3 Pick., 304; Thomas v. Croswell, 7 John., 264; see Clark v. Binney, 2 Pick., 113; Rex v. Fleet, 1 Barn. & Ald., 379.

³ 3 Chitty Cr. L., 870; 6 Bing., 213; 2 Mod., 118; Stiles v. Nokes, 7 East, 492.

⁴ 6 Bing., 213.

⁵ Rex v. Fisher, 2 Camp., 563; Rex v. Fleet, 1 Barn. & Ald., 379; Stiles v. Nokes, 7 East, 493; Carr v. Jones, 3 Smith, 491; Com. v. Culver, 2 Penn. Law Jour., 302; Story v. Wallace, 60 Ills., 54.

⁶ Rex v. Carlile, 3 Barn. & Ald., 167.

⁷ 2 Bish. Cr. L., § 915; Story v. Wallace, 60 Ills., 51

⁸ Malone v. Stewart, 15 Ohio, 319.

⁹ Clement v. Chives, 4 Man. & R., 127, 9 B. & Cres., 172.

¹⁰ Rex v. Kinnersly, 1 W. Bl., 294.

¹¹ Walker v. Winn, 8 Mass., 248.

¹² Smith v. State, 32 Texas, 594.

ished to find an infant in her arms—progeny which he could not father.¹

§ 725. **Libels which Injure Another's Business.** — It is indictable to be concerned in a publication which may impair or hurt a man in his trade or livelihood, as, for instance, to call a tradesman a bankrupt, a physician a quack, or a lawyer a knave, or the like,² or to charge him with offering himself as a witness in order to divulge the secrets of his client.³

§ 726. **What not a Libel.** — It is not libelous to print and publish of a person that he refused to contribute his mite with his fellow merchants for watering a street.⁴ And terms of general abuse are not enough.⁵ Accordingly "The mayor and aldermen of Q, are a pack of as great villains as any that rob on the highway" were held not to be indictable.⁶

§ 727. **Libel must be in Writing — Abuse.** — No indictment will lie for words not reduced to writing,⁷ unless they be seditious, blasphemous,⁸ grossly immoral,⁹ or spoken in contempt of judicial officers while in the discharge of their duties,¹⁰ or consist of libelous songs sung in the streets or other public places,¹¹ or obscene language uttered in the hearing of others,¹² or of a challenge to fight a duel.¹³

¹ *Story v. Wallace*, 60 Ills., 52.

² Whart. Cr. L., § 2531.

³ *Riggs v. Deniston*, 3 John. C., 198.

⁴ *People v. Jerome*, 1 Mich., 142.

⁵ *Tappan v. Wilson*, 7 Ohio, 190; *State v. Farley*, 4 McCord, 317.

⁶ *Rex v. Granfield*, 12 Mod., 98; see *Rex v. Baker*, 1 Mod., 35; *Rex v. Waite*, 1 Wils., 22.

⁷ *Rex v. Freake*, Comb., 13; *Rex v. Bear*, 2 Salk., 417; *Rex v. Langley*, 6 Mod., 125.

⁸ 2 Bish. Cr. P., § 123; *State v. Chandler*, 2 Harring., 553.

⁹ Whart. Cr. L., § 2534.

¹⁰ *Rex v. Baker*, 1 Mod., 35; *Reg. v. Nun*, 10 Mod., 186; *Rex v. Darby*, 3 Mod., 139; *Reg. v. Taylor*, 2 Ld. Raym., 879.

¹¹ *Rex v. Benfield*, 2 Bur., 980.

¹² *Bell v. State*, 1 Swan, 42; *State v. Appling*, 25 Mo., 515; *Baker v. Com.*, 7 Harris, 412.

¹³ *Rex v. Phillips*, 6 East, 464; *Reg. v. Langley*, 2 Ld. Raym., 1029; *State v. Perkins*, 6 Blackf., 20; *State v. Farrier*, 1 Hawks, 487.

§ 728. Libel by Hanging in Effigy — By Painting. — Libels may be expressed by hanging in effigy, by caricatures, signs or pictures.¹ Thus the painting of a man's likeness with the ears of an ass to it, and then exposing it for sale at auction, is indictable as a libel.²

§ 729. Evidence — 1. The Prosecutor must Produce the Libel³ or account for its absence,⁴ and it must agree with the indictment in every particular essential to the identity, such as dates, names of persons, and the precise words used, for a variance in any of these particulars is fatal.⁵ But the mere alteration of a single letter, so long as it does not change one word into another, will not vitiate.⁶ Thus "undertood" for "understood,"⁷ "receved" for "received,"⁸ "Segrave" for "Seagrave,"⁹ and the like, are immaterial variances; though the smallest variance, if it renders the meaning different, will be fatal,¹⁰ except where the libel is too obscene to appear upon the records; then if such a description of the offense is given as decency will permit, and the reason for omitting the exact words stated, the proof may be received.¹¹ Where the paper is in the prisoner's possession, or has been destroyed by him, and perhaps in some other cases, where its production is out of the power of the prosecutor, in all of which cases it should be so stated in the indictment, inasmuch as it may be sufficient to state the purport or substance of the libel, secondary evidence may be received of its contents.¹² If the libel is in the

¹ 2 Arch. C. P. & Pl., 203, 204; *People v. Croswell*, 3 John. C., 353

² *People v. Mezzara*, 2 City H. Rec., 113

³ 2 Arch. C. P. & Pl., 235.

⁴ *Rex v. Watson*, 2 T. R., 201.

⁵ *Tabart v. Tipper*, 1 Campb., 352.

⁶ *Rex v. Beach*, 1 Leach C. C., 133.

⁷ *Rex v. Beach*, Cowp., 229.

⁸ *Rex v. Hart*, 2 East P. C., 977, 1 Leach C. C., 145.

⁹ *Williams v. Ogle*, 2 Stra., 889.

¹⁰ 3 Greenl. Ev., § 167.

¹¹ *Com. v. Tarbox*, 1 Cush., 66; *Com. v. Holmes*, 17 Mass., 336.

¹² *Com. v. Houghton*, 8 Mass., 107, 110; *State v. Bonney*, 34 Me., 223; *People v. Kingsley*, 2 Cowen, 522; *United States v. Britton*, 2 Mason, 464, 467, 468; *Johnson v. Hudson*, 7 Ad. & El., 233, note.

exclusive possession of the defendant, notice to produce it must be given before secondary evidence of its contents can be received.¹

§ 730. 2. Proof of Publication of the Libel is Indispensable.²—Publication consists in communicating the defamatory matter to the mind of another or to others.³ The charge will be supported by proof of publication alone with the required criminal intent, this being the essence of the offense.⁴ The full criminal offense is committed by sending a libel to a person, though it reaches the ears of no third individual.⁵ In such a case the civil action for libel cannot be maintained.⁶ It is sufficient proof of publication to show that the defendant wrote the libel, which is found in another's possession until this fact is otherwise accounted for;⁷ and if a letter containing a libel have a postmark upon it and the seal be broken, this is *prima facie* evidence of its publication.⁸ If the libel be in a newspaper, the act of printing it, though the proprietor does not know at the time that libelous matter is inserted in the paper,⁹ if not otherwise explained by circumstances,¹⁰ or selling it even by a general agent or servant in the furtherance of the principal's business, unless in violation of his express orders, is sufficient evidence of publication.¹¹ If, however, the

¹ *Rex v. Watson*, 2 T. R., 201.

² 2 Arch. C. P. & Pl., 227; Roscoe Cr. Ev., 654; Lamb's Case, 9 Co., 59b; Paine's Case, 5 Mod., 165, 167; *Rex v. Watson*, 2 T. R., 201; *Taylor v. State*, 4 Ga., 14; *contra*, *Rex v. Burdett*, 4 Barn. & Ald., 95.

³ 1 Hawks P. C. C., 73, § 11; *State v. Avery*, 7 Conn., 269; *Reg. v. Wegener*, 2 Stark. R., 245; *Hodges v. State*, 5 Humph., 112.

⁴ *Rex v. Hunt*, 2 Campb., 583; *Rex v. Williams*, 2 Campb., 646.

⁵ *Phillips v. Jansen*, 2 Esp., 624; *Rex v. Pownell*, W. Kel., 58; *State v. Avery*, 7 Conn., 226; *Rex v. Wegener*, 2 Stark., 245; *Ex parte Dale*, 28 Eng. L. & Eq., 165.

⁶ *Sheffill v. Van Deusen*, 13 Gray, 304.

⁷ *Rex v. Beare*, 1 Ld. Raym., 414; Lamb's Case, 9 Co., 59; *Reg. v. Lovett*, 9 Car. & P., 462.

⁸ *Shiply v. Todhunter*, 7 Car. & P., 680; *Warren v. Warren*, 1 M. & R., 250.

⁹ *Story v. Wallace*, 60 Ills., 51; *Com. v. Morgan*, 108 Mass., 199.

¹⁰ *Baldwin v. Elphinstone*, 2 W. Bl., 1038.

¹¹ *Woodfall's Case*, 1 Hawks P. C. C., 73, § 10, note; *Rex v. Almon*, 5 Burr, 2686; 1 Leading Cases, 241; *Com. v. Nichols*, 10 Met., 259; *Com. v. Buckingham*, 2 Wheeler C. C., 198; *Rex v. Davis*, 3 Yates, 128.

libel was sold by a special agent, the agency must be particularly proved to make the principal liable.¹ The selling of the libel to the agent of the person libeled is a sufficient publication. If one repeats and another writes a libel, with a view to its publication, and a third approves of what is written, and a fourth puts it in circulation, they are all guilty of making and publishing the libel.² Every separate copy of a libel which the defendant publishes is a several publication, and subjects him to a distinct indictment.³

§ 731. **When the Time must be Proved Exactly as Alleged.** — If the indictment simply alleges the publication to have been made on a day named, the proof may show the day of publication to have been any other one within the statute of limitations.⁴ But if it is needlessly alleged that the libel was contained in a newspaper, or any other paper of a particular date, this becomes a matter of description of the instrument; in this case the form of the allegation is satisfied only by a newspaper or other paper of the date mentioned.⁵

§ 732. **Venue — Admission.** — The publication must be proved to have been made within the county where the trial is had.⁶ The writer or printer of a libel is guilty of a publication in every county in which it was circulated and read with his consent.⁷ And it has been held where a libel was written in one county with intent to publish it in another county, and was accordingly sent by him to such county and there so published, that this was evidence sufficient to charge the party in the county in which it was written.⁸ The admission of the

¹ *Harding v. Greening*, 8 Taunt., 42.

² *Reg. v. Drake*, Holt, 425; *Rex v. Paine*, 5 Mod., 163, 408; *Rex v. Williams*, 2 Campb., 646; *Adams v. Kelley*, Ry. & M., 157; *Wilson v. Noonan*, 27 Wis., 599.

³ *Rex v. Carlile*, 3 Barn. & Ald., 161, 1 Chitty, 409.

⁴ 2 Bish. Cr. P., § 802.

⁵ *Com. v. Varney*, 10 Cush., 402.

⁶ 3 Greenl. Ev., § 173; *Nicholson v. Lothrop*, 3 John., 139.

⁷ *Russ. on C.*, 258; 12 St. Tr., 331; *Rex v. Watson*, 1 Campb., 215; *Rex v. Johnson*, 9 East, 65; *Com. v. Blanding*, 3 Pick., 304; *Seven, Bishop's Case*, 12 Howell St. Tr., 331, 332.

⁸ 3 Greenl. Ev., § 173; *Rex v. Burdett*, 4 Barn. & Ald., 95; *U. S. v. Worrell*, 2 Dall., 388.

defendant is sufficient evidence of publication,¹ but does not prove that he published it in a particular county.²

§ 733. 3. It must Appear that the Publication was a "Malicious Defamation,"³ for if no malicious intent existed, no libel was published.⁴ In all cases where the publication is in itself defamatory the law infers malice,⁵ unless something is drawn from the circumstances attending it to rebut the inference, in which case it is necessary to offer some substantial proof of malice;⁶ though malice in this connection does not necessarily imply ill-will;⁷ but a man must be presumed to have intended to produce the effect which his act will naturally produce; and libeling without excuse is legal malice.⁸ Evidence of the defendant's having published other copies of the same libel,⁹ or other libels,¹⁰ provided they expressly refer to the subject of the libel set out in the indictment,¹¹ is inadmissible in order to prove the malicious intent.¹² And the defendant may

¹ *Com. v. Guild, Thatch. C. C.*, 329; *Rex v. Hall*, 1 *Str.*, 416.

² *Seven, Bishop's Case*, 12 *Howell St. Tr.*, 183.

³ *R. S.*, 378, § 177.

⁴ *People v. Codd*, 2 *City Hall Rec.*, 171; *Whitney v. Allen*, 62 *Ills.*, 472.

⁵ *Rex v. Abingdon*, 1 *Esp.*, 228; *Dexter v. Spear*, 4 *Mason*, 115; *Bartholemey v. People*, 2 *Hill*, 248; *White v. Nichols*, 3 *How. S. C. R.*, 291; *Rex v. Creevy*, 1 *M. & S.*, 282; *Jones v. Stephens*, 11 *Price*, 235.

⁶ 3 *Greenl. Ev.*, § 168; *Stuart v. Lovell*, 2 *Stark. C.*, 93; *Bromage v. Prosser*, 4 *B. & Cres.*, 256; *Wright v. Woodgate*, *Tyr. & G.*, 15; *Rex v. Evans*, 3 *Stark.*, 35.

⁷ *Com. v. Bonner*, 9 *Met.*, 410; *Curtis v. Massey*, 6 *Gray*, 261; *Com. v. Snelling*, 15 *Pick.*, 340.

⁸ *Rex v. Harvey*, 2 *B. & Cres.*, 257; *Duncan v. Tharvities*, 3 *B. & Cres.*, 385; *Rex v. Burdett*, 4 *Barn. & Ald.*, 95; *Bodwell v. Osgood*, 3 *Pick.*, 379; *Com. v. Blanding*, 3 *Pick.*, 304; *Root v. King*, 7 *Cowen*, 613; *Andres v. Wells*, 7 *John*, 260; *Washburne v. Cooke*, 3 *Denio*, 110; *Com. v. Sanderson*, 3 *Penn. Law Jour.*, 269; *Layton v. Harris*, 3 *Harring.*, 406.

⁹ *Plunket v. Cobbett*, 5 *Esp.*, 136.

¹⁰ *Rex v. Pearce, Peake*, 75; *Rex v. Lambert*, 2 *Campb.*, 398; *Cook v. Hughes, Ry. & M.*, 112; *Rex v. Stanley*, 5 *Car. & P.*, 213.

¹¹ *Finnerty v. Tipper*, 2 *Campb.*, 72; *Com. v. Harmon*, 2 *Gray*, 289.

¹² *Com. v. Snelling*, 15 *Pick.*, 337; *Thatch. C. C.*, 318. But it has been held that if such publications were posterior to the one complained of they were not admissible. *Thomas v. Croswell*, 7 *John.*, 270; *U. S. v. Crandall*, 4 *Cranch C. C.*, 683.

show want of malice¹ by proving that the libel was published by his servant without his consent,² or against his express orders,³ or without his knowing what it was, or by inadvertence;⁴ although it has been held in a civil action that the publication of a libel was not excused by the publisher's ignorance that it contained libelous matter.⁵

§ 734. **Defense — Privileged Communications** in which malice will not be inferred or presumed⁶ have been distributed into four classes.⁷ 1. Where the author acted in a *bona fide* discharge of a public or private duty, legal or moral, or in the prosecution of his own rights or interests.⁸ 2. Any thing said or written in giving the character of a servant.⁹ 3. Words used in the course of legal or judicial proceedings, however hard they may bear upon the party of whom they are used,¹⁰ though if a party or his attorney goes out of the case and makes false charges which are wholly immaterial to the proceeding, to asperse and villify another, he is not privileged.¹¹ 4. Publications duly made in the ordinary mode of legislative proceedings.¹² Members of legislative assemblies are not to be called in question for their official acts or for words spoken in

¹ Shehan v. Collin, 20 Ills., 325; Thomas v. Dunway, 30 Ills., 373; Rex v. Harvey, 3 Dowl. & Ryl., 461.

² 3 Greenl. Ev., § 178; Roscoe Cr. Ev., 662.

³ 3 Greenl. Ev., § 170; Rex v. Almon, 5 Burr, 2686; Com. v. Nichols, 10 Met., 259.

⁴ Roscoe Cr. Ev., 662; but see Story v. Wallace, 60 Ills., 51.

⁵ Curtis v. Massey, 6 Gray, 261; Story v. Wallace, 60 Ills., 52.

⁶ White v. Nichols, 3 How. S. C. R., 286; Whitney v. Allen, 62 Ills., 472.

⁷ White v. Nichols, 3 How. S. C. R., 286.

⁸ Id.; O'Donaghue v. McGovern, 23 Wen., 26; State v. Burnham, 9 N. H., 34; Bradley v. Heath, 12 Pick., 163; VanWyck v. Aspinwall, 17 N. Y., 191; Hunt v. Bennett, 19 N. Y., 173; Goodnow v. Tappan, 1 Ohio, 60.

⁹ Roscoe Cr. Ev., 663; Washburne v. Cook, 3 Denio, 112; Weatherstone v. Hawkins, 1 T. R., 110; Child v. Affleck, 9 B. & Cres., 403.

¹⁰ Garr v. Selden, 4 N. Y., 91; Story v. Wallace, 60 Ills., 51; Whitney v. Allen, 62 Ills., 472.

¹¹ Gilbert v. People, 1 Denio, 41.

¹² 2 Bish. Cr. L., 917; Rex v. Wright, 8 T. R., 293; *contra*, Stockdale v. Hansard, 9 Ad. & El., 1.

debate.¹ But if a member causes a speech which contains libelous matter to be published, he is not protected in respect of such publication; for the publishing of it is an act outside of his legislative duties.²

§ 735. **Proof of Malice in Making a Privileged Communication.** — If the communication was of a class absolutely privileged, proof of actual malice is inadmissible, as it constitutes no answer or bar to the privilege.³ Such is the case of matter necessarily published in due discharge of an official or public⁴ duty. But where the publication is only *prima facie* privileged, as in the case of a character given a servant or of advice confidentially given, or a petition to have a states' attorney suspended, and a states' attorney *pro tem.* appointed, the defense of privilege may be rebutted by proof of actual malice.⁵

4. RACING.

§ 736. **Provisions of the Statute.** — "Whoever shall be guilty of driving or racing on any public highway in such a manner as to endanger the persons or lives of others, shall be fined not exceeding one hundred dollars, or confined in the county jail not more than thirty days."⁶

STATEMENT OF THE OFFENSE OF RACING.

(*Commence as in form on page 35*) that C. D., on, etc., at, etc., in the said county, unlawfully was guilty of driving and racing on a certain public highway there situate leading from Quincy to Payson in said county, in such a manner as to endanger the lives of others, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

¹ R. S., 62, Const. Ills., Art. 3, § 14; 1 Kent Com., 235; Coffin v. Coffin, 4 Mass., 1.

² 2 Bish. Cr. L., § 917; Rex v. Creevy, 1 M. & S., 273; Rex v. Abbington, 1 Esp., 226; Rex v. Williams, 2 Show, 471.

³ 3 Greenl. Ev., § 168; but see Whitney v. Allen, 62 Ills., 472.

⁴ Whitney v. Allen, 62 Ills., 472.

⁵ Sands v. Robinson, 12 S. & M., 604; Whitney v. Allen, 62 Ills., 473.

⁶ R. S., 390, § 247.

5. ROUT.

§737. Provisions of the Statute. — “If two or more persons shall meet to do an unlawful act, upon a common cause of quarrel, and make advances toward it, they shall be deemed guilty of a rout, and shall be severally fined not exceeding \$100, or confined in the county jail not exceeding four months.”¹

STATEMENT OF THE OFFENSE OF ROUT.

(Commence as in form on page 35) that C. D. and E. F., on, etc., at, etc., in the said county, did unlawfully meet to do an unlawful act, *to wit.*, to assault and beat the said A. B. upon a common cause of quarrel and having so assembled to do the said unlawful act did then and there make advances toward it by then and there running after the said A. B. and attempting to catch him for that purpose, contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

6. RIOT.

§ 738. Provisions of the Statute. — “If two² or more persons actually do an unlawful act, with force or violence, against the person or property of another, with or without a common cause of quarrel, or even do a lawful act in a violent and tumultuous manner, the persons so offending shall be deemed guilty of a riot, and shall severally be fined not exceeding \$200, or confined in the county jail not exceeding six months.”³

STATEMENT OF THE OFFENSE OF RIOT.

(Commence as in form on page 35) that C. D. and E. F., on, etc., at, etc., in the said county, then and there being together,⁴ did riotously and with force

¹ R. S., 390, § 248.

² At common law the concurrence of three or more persons in doing the unlawful act was indispensable to make the offence a riot. *Turpin v. State*, 4 Blackf., 72; *Reg. v. Ellis*, Holt, 636; *State v. Allison*, 3 Yerg., 428; *Rex v. Scott*, 3 Bur., 1262; *Rex v. Sudbury*, 12 Mod., 262; *Com. v. Edwards*, 1 Ashm., 46. But in Maine the court decided that if two persons do the physical mischief while a third is present abetting them, the offence may amount to a riot. *State v. Straw*, 33 Me., 554; *contra*, *Scott v. U. S.*, Morris Iowa, 142; and see *Hardebeck v. State*, 10 Ind., 459.

³ R. S., 390, § 249; *Van Meter v. People*, 60 Ills., 168.

⁴ It is not necessary to allege an unlawful assemblage. *Dougherty v. Peo-*

and violence assault, beat, wound and ill-treat the said A. B., contrary to the form of the statute in such case made and provided (*conclude as in form on page 35*).

§ 739. **What a Riot.**—In this state it is sufficient to constitute a riot, that two or more persons being together actually do an unlawful act with force and violence against the person or property of another, or a lawful act in a violent or tumultuous manner.¹ Probably under our statute it is not necessary that the act should create an apprehension of danger in the minds of persons other than the rioters,² which, according to some of the authorities, seemed to be required at common law, in some cases, to complete the offense of riot.³ It has been held that the words “that the defendant made a great noise and disturbance of the peace” in an indictment for a riot were too vague and uncertain, because the way and manner in which the great noise and disturbance of the peace was effected was not stated.⁴ Where a party claiming to have purchased a colt procured the assistance of two persons to drive the animal from the range into the inclosure of the owner, and, against the remonstrance of the latter, attempted to secure the colt and take it away, and one of the confederates, being armed with a pistol, threatened the owner, upon his interference to prevent the property from being taken out of his possession, it was held that these acts constituted a riot.⁵

7. SUPPRESSION OF UNLAWFUL ASSEMBLIES.

§ 740. **Provisions of the Statute.**—“When twelve or more persons, any of them armed with clubs or dangerous weapons, or thirty or more armed or unarmed, are unlawfully, riotously or tumultuously assembled in any city, village or town, it

ple, 4 Scam., 180; *McWaters v. State*, 10 Mo., 167; though it was otherwise at common law; 2 Bish. Cr. P., § 995; *Reg. v. Soley*, 2 Salk., 594.

¹ *Dougherty v. People*, 4 Scam., 179; *Bill v. Mallory*, 61 Ills., 167.

² *Com. v. Runnels*, 10 Mass., 518.

³ 2 Bish. Cr. L., § 1147; *Rex v. Hughes*, 4 Car. & P., 272.

⁴ *Whitesides v. People*, Breese, 21.

⁵ *Bell v. Mallory*, 61 Ills., 167.

shall be the duty of each of the municipal officers, constables and justices of the peace thereof, and of the sheriff of the county and his deputies, to go among the persons so assembled or as near to them as they can safely go, and in the name of the state command them immediately and peaceably to disperse, and if they do not obey, such officers shall command the assistance of all persons present, in arresting and securing the persons so unlawfully assembled; and every person refusing to disperse or to assist as aforesaid, shall be deemed one of such unlawful assembly, and shall be fined not exceeding five hundred dollars and confined in the county jail not exceeding one year; and each such officer having notice of such unlawful assembly, and refusing or neglecting to do his duty in relation thereto, as aforesaid, shall be fined not exceeding \$200.”¹

§ 741. **Refusal to Disperse.** — “When persons so riotously or unlawfully assembled neglect or refuse, on command as aforesaid, to disperse without unnecessary delay, any two of the magistrates or officers aforesaid may require the aid of a sufficient number of persons, in arms or otherwise, and proceed in such manner as they judge expedient to suppress such riotous assembly, and arrest and secure the persons composing it; and when an armed force is thus called out, they shall obey the orders for the suppressing such assembly, and arresting and securing the persons composing it, which they receive from the governor, any judge of a court of record the sheriff of the county, or any two of the magistrates or officers mentioned in the preceding section.”²

§ 742. **Killing Justified.** — “If, in the efforts made as aforesaid to suppress such assembly and to arrest and secure the persons composing it, who refuse to disperse, though the number remaining is less than twelve, any such persons, or any persons present as spectators, or otherwise, are killed or wounded, said magistrates and officers, and persons acting with them by their order, shall be held guiltless and justified

¹ R. S., 390, § 253.

² Id., § 254.

in law. If any of the said magistrates or officers, or persons thus acting with them, are killed or wounded, all persons so unlawfully or riotously assembled, and all other persons who refused, when required, to aid such magistrates and officers, shall be held answerable therefor.”¹

STATEMENT OF THE OFFENSE OF REFUSING TO DISPERSE BY PERSONS
UNLAWFULLY ASSEMBLED.

(Commence as in form on page 35) that C. D., E. F., G. H., I. J., K. L., M. N., O. P., Q. R., E. G., E. H., E. I., and E. J., and divers other persons to the said A. B. unknown, on, etc., at the city of ———, in said county, then and there being armed with clubs and other dangerous weapons, and unlawfully, riotously, and tumultuously assembled together in the said city, and being then and there, in the name of the said state of Illinois, by the sheriff of the said county, duly commanded immediately and peaceably to disperse, unlawfully did refuse to disperse, contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

8. INJURIES TO PROPERTY BY UNLAWFUL ASSEMBLIES.

§ 743. Provisions of the Statute. — “If any persons thus unlawfully and riotously assembled, pull down or begin to pull down or destroy any dwelling-house, building, ship or vessel, or perpetrate any premeditated injury, not a felony, on any person, each shall be imprisoned in the penitentiary not more than five years, or fined not exceeding five hundred dollars, and shall also be liable to any person injured in an action of trespass, to the full amount of damages by him sustained.”²

STATEMENT OF THE OFFENSE OF INJURING PROPERTY BY AN UNLAWFUL
ASSEMBLY.

(Commence as in form on page 35) that C. D., E. F., G. H., I. J., K. L., M. N., O. P., Q. R., E. G., E. H., E. I. and E. J., and divers other persons to the said A. B. unknown, on, etc., at the city of —, in said county, then and there being armed with clubs and other dangerous weapons, and then and there unlawfully, riotously and tumultuously assembled together in the said city, feloniously did pull down the dwelling-house of the said A. B. there situate, contrary to the form of the statute in such case made and provided (conclude as in form on page 35).

¹ R. S., 391, § 256.

² Id., § 255.

SECTION X.

ACCESSORIES TO CRIMES, ATTEMPTS TO COMMIT OFFENSES, AND
OFFENSES AT COMMON LAW.

§ 744. Accessories before the Fact.

745. May be Punished Independently of the Principal.

746. Accessories after the Fact.

747. Advice or Encouragement—What Sufficient.

748. Inciting or Employing Another to Commit a Crime.

749. Accessory may be Tried before Principal or as Principal.

750. Evidence.

751. Attempting to Commit an Offense.

752. Attempt to Commit an Offense—When or where it is Impossible to Commit it.

753. Soliciting Another to Commit an Offense.

754. Offenses at Common Law.

1. ACCESSORIES TO CRIME.

§ 744. **Before the Fact.**—“An accessory is he who stands by, and aids, abets or assists, or who, not being present, aiding, abetting or assisting, hath advised, encouraged, aided or abetted the perpetration of the crime. He who thus aids, abets, assists, advises or encourages, shall be considered as principal and punished accordingly.”¹

§ 745. **May be Punished Independently of Principal.**—“Every such accessory, when a crime is committed within or without this state by his aid or procurement in this state, may be indicted and convicted at the same time as the principal, or before or after his conviction, and whether the principal is convicted or amenable to justice or not, and punished as principal.”²

¹ R. S., 393, § 274; *Van Meter v. People*, 60 Ills., 169.

² R. S., 393, § 275.

§ 746. **After the Fact.** — “Every person not standing in the relation of husband or wife, parent or child, brother or sister to the offender, who knows the fact that a crime has been committed, and conceals it from the magistrate, or who harbors, conceals, maintains or assists any principal felon, or any accessory before the fact, knowing him to be such, shall be deemed an accessory after the fact, and shall be punished by imprisonment not exceeding two years, and fined not exceeding \$300.”²

STATEMENT OF THE OFFENSE OF AN ACCESSORY TO A RAPE BEFORE THE FACT.

(Commence as in form on page 35) that E. H.,² on, etc., at, etc., in the said county, feloniously and violently did make an assault in and upon G. H., a female then and there being, and her, the said G. H. then and there violently and against her will, feloniously and forcibly did ravish and carnally know; and that C. D.³ was then and there present, feloniously and willfully aiding, abetting and assisting the said E. H. in the commission of the said offense (conclude as in form on page 35).

STATEMENT OF THE OFFENSE OF AN ACCESSORY AFTER THE FACT.¹

(Commence as in form on page 35, and then state the offense against the principal in the usual form and then add); and that C. D. after the said E. F. had committed the said crime as aforesaid, and on the — day of —, A. D. 18—, at, etc., in the said county, then at the time last above mentioned, and there, well knowing that the said crime had been committed, and that the said C. D. had committed the same, unlawfully, and willfully did conceal the said crime from the magistrates of the said county (or “harbor, conceal, maintain, and assist the said E. F.”) (conclude as in form on page 35).

§ 747. **Advice or Encouragement, what Sufficient.** — The advice or encouragement may be by words, acts, signs, or motions,¹ or

¹ R. S., 393, § 276.

² If the name of the principal is unknown, it is sufficient to allege that “some person to the jurors unknown,” etc. *Com. v. Glover*, 111 Mass., 395.

³ If the pleader chooses he may charge the accessory as principal, and need not mention the fact that the act was done by another. *Brennan v. People*, 15 Ills., 516; *Dempsey v. People*, 47 Ills., 323; *Baxter v. People*, 3 Gilm., 368; *Yoe v. People*, 49 Ills., 410; *Bonsell v. U. S.*, 1 Greene, Iowa, 111. It was otherwise at common law in cases of felony. 2 Bish. Cr. P., § 9; *State v. Wyckoff*, 2 Vroom, 65.

¹ *Brennan v. People*, 15 Ills., 511; *Kennedy v. People*, 40 Ills., 488.

through the intervention of an agent.¹ As if A bid his servant to hire somebody, no matter whom, to murder B, and furnish him money for that purpose, and the servant procure C, a person whom A never saw or heard of, to do it, A is guilty as an accessory.² If the principal conform substantially, though he vary slightly in the manner of the execution, the accessory is guilty.³ And if he advises or encourages another to beat or rob, and death ensues in consequence, he is guilty of murder although he took no part in the killing; or if he advises another to burn the barn of A, and in burning A's barn the fire is communicated to the barn of C, which is also burnt, he is guilt as an accessory to the burning of C's barn;⁴ for he who advises or encourages another to do an illegal act is responsible for all the natural and probable consequences that may arise from its perpetration.⁵ But it is otherwise, if the principal totally and substantially varies from the terms of the advice and encouragement so as to commit another and distinct crime which is not the natural or probable result of the encouragement.⁶ If the advice and encouragement is countermanded before the commission of the offense, the party is not guilty as an accessory.⁷ One who incites others to commit an assault and battery is guilty and may be punished as a principal if the offense be actually committed, although he did not otherwise participate in it.⁸ A wife may be an accessory before the fact in the crime of her husband.⁹

§ 748. **Inciting or Employing Another to Commit a Crime.** — If one incites or employs another to make an illegal arrest,¹⁰ or to

¹ *Rex v. Cooper*, 5 Car. & P., 534; *Reg. v. Williams*, 1 Den. C. C., 39; *Rex v. Giles*, 1 Moody, 166.

² 1 Arch. C. P. & Pl., 72; *Rex v. Overbury*, 19 Howell St. Tr., 804.

³ 1 Arch. C. P. & Pl., 72; *Foster*, 370.

⁴ *Foster*, 369.

⁵ *Brennan v. People*, 15 Ills., 516.

⁶ 1 Arch. C. P. & Pl., 72, 73.

⁷ 1 Hale P. C., 617.

⁸ *State v. Lymburn*, 1 Brev., 385; *Rex v. Jackson*, 1 Dev., 124; *State v. Check*, 13 Ired., 114; *Baker v. State*, 12 Ohio S., 214.

⁹ *Reg. v. Manning*, 2 Car. & K., 887.

¹⁰ *Floyd v. State*, 7 Engl., 43; *Reg. v. Tracy*, 6 Mod., 178.

keep a bawdy house;¹ or to sell intoxicating liquors without a license;² or to bet on an election;³ or to pass counterfeit money;⁴ or to set fire to a building;⁵ or to commit any other crime,⁶—he is an accessory, and may be indicted for doing the thing as principal. And the person employed is also criminally responsible.⁷

§ 749. **Accessory may be Tried Before Principal or as Principal.**—At common law an accessory to a felony could never be tried without his consent before the conviction or outlawry of the principal;⁸ but under our statute an accessory before the fact must be indicted as principal if indicted at all, and may be tried before the real principal, or afterwards or jointly with him,⁹ as in cases of misdemeanors at common law.¹⁰ By our statute the distinction between accessories before the fact and principal is abolished,¹¹ but this is not true as to accessories after the fact;¹² yet a party may be convicted as an accessory after the fact and punished accordingly, though indicted as principal.¹³

§ 750. **Evidence.**—Where the accessory is indicted separately from the principal, and there is no joint purpose proved, the

¹ *Ross v. Com.*, 2 B. Monr., 417.

² *State v. Brown*, 31 Me., 520; *State v. Dow*, 21 Vt., 484; *Com. v. Nichols*, 10 Met., 259; *Schmidt v. State*, 14 Mo., 137; *State v. Anon*, 2 Nott & McC., 27.

³ *Williams v. State*, 12 Sm. & M., 58.

⁴ *U. S. v. Morrow*, 4 Wash. C. C., 733; *State v. Cheek*, 13 Ired., 114; *Reg. v. Greenwood*, 7 Eng. L. & Eq., 535.

⁵ *Reg. v. Clayton*, 1 Car. & K., 128.

⁶ *R. S.*, 393, § 274; 1 Bish. Cr. L., § 686.

⁷ 1 Bish. Cr. L., § 688; *Stevens v. People*, 67 Ills., 587.

⁸ 1 Arch. C. P. & Pl., 74; 1 Bish. Cr. L., § 667; *Baxter v. People*, 3 Gilm., 382; *Ogden v. State*, 12 Wis., 532.

⁹ *Baxter v. People*, 3 Gilm., 382; *Brennan v. People*, 15 Ills., 516; *Dempsey v. People*, 47 Ills., 323; *Yoe v. People*, 49 Ills., 410.

¹⁰ 1 Bish. Cr. L., § 685.

¹¹ *Van Meter v. People*, 60 Ills., 169; *State v. Brown*, 25 Iowa, 561; *State v. Thornton*, 26 Iowa, 80.

¹² *Yoe v. People*, 49 Ills., 410.

¹³ *Id.*

confession of the latter does not prove his guilt as against the former.¹

2. ATTEMPTING TO COMMIT AN OFFENSE.

§ 751. **Provisions of the Statute.** — “Whoever attempts to commit an offense prohibited by law, and does any act towards it, but fails, or is intercepted or prevented in its execution, where no express provision is made by law for the punishment of such attempt, shall be punished, when the offense thus attempted is a felony, by imprisonment in the penitentiary not less than one nor more than five years; in all other cases, by fine not exceeding three hundred dollars, or by confinement in the county jail not exceeding six months.”²

STATEMENT OF THE OFFENSE OF ATTEMPTING TO COMMIT AN OFFENSE.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, unlawfully, (or if the attempt was to commit a felony “feloniously”) did attempt and endeavor to (state the offense intended to be committed in the usual form) by³ (state what he did and then conclude as in form on page 35).

§ 752. **Attempt to Commit an Offense — When or Where it is impossible to Commit it.** — A man may attempt to commit a crime which it is impossible for him then to commit.⁴ As to attempt to steal from the pocket of another, when in fact there is nothing in the pocket that can be stolen,⁵ or to procure the miscarriage of a woman supposed to be pregnant, when in fact she is not pregnant,⁶ or to poison another by giving him

¹ Simmons v. State, 4 Ga., 465; Ogden v. State, 12 Wis., 532.

² R. S., 393, § 273. At common law an attempt to commit either a felony or a misdemeanor, was a misdemeanor; 1 Arch. C. P. & Pl., 85; 1 Bish. Cr. L., § 759.

³ It has been held that it is necessary to set out the acts done in making the attempt. State v. Wilson, 30 Conn., 500; Com. v. Clark, 6 Grat., 675, 684; Rex v. Carr, Russ. & Ry., 377; Rex v. Marsh, 1 Den. C. C., 505; contra, People v. Bush, 4 Hill, 133, 134; Lewis v. State, 35 Ala., 380.

⁴ Bish. Cr. L., § 742, 743; Kunkle v. State, 32 Ind., 220; contra, State v. Swails, 8 Ind., 524.

⁵ Com. v. McDonald, 5 Cush., 355; State v. Wilson, 30 Conn., 500; contra, Reg. v. Collins, Leigh & C., 471.

⁶ Reg. v. Goodhall, 1 Den. C. C., 187.

a substance not poisonous, though he believed it to be so.¹ Yet the authorities are not agreed upon this point, for there are some cases which seem to hold that one does not attempt to discharge loaded arms if the touch-hole is so plugged that the instrument cannot possibly be fired,² or if from not being primed or otherwise it does not contain a charge capable of doing the mischief intended,³ for in such case the "arms" are not "loaded." It has also been held that a boy under the age of fourteen years, and not having arrived at the age of puberty, being incapable in law to commit the legal crime of rape, could not be guilty of an attempt to commit a rape.⁴ There cannot be an attempt to personate another who never had an existence;⁵ but there can be of one who has lived and is dead.⁶

§ 753. *Soliciting Another to Commit an Offense.* — Soliciting another to commit an offense was a misdemeanor at common law,⁷ and is a common form of an attempt to commit a crime.⁸ Therefore a person is guilty of an attempt to commit an offense who solicits a servant to steal his master's goods,⁹ or other person to undertake a larceny¹⁰ or to commit sodomy,¹¹ or to live with him in an open state of adultery,¹² or to offer a

¹ *State v. Clarissa*, 11 Ala., 57; *Reg. v. Chidery*, 1 Den. C. C., 515; *Goldsmith's Case*, 3 Campb., 76.

² *Rex v. Harris*, 5 Car. & P., 159.

³ *Rex v. Carr*, Russ. & Ry., 377; *Reg. v. Oxford*, 9 Car. & P., 525; *Vaughn v. State*, 3 Sm. & M., 553.

⁴ *Reg. v. Phillips*, 3 Car. & P., 736; *Rex v. Eldershaw*, 3 Car. & P., 396; *Williams v. State*, 14 Ohio, 222; *State v. Handy*, 4 Harring., 566; *People v. Randolph*, 2 Parker, 213; *State v. Sam*, Wintson, 300; *contra*, *Com. v. Green*, 2 Pick., 380; *Smith v. State*, 12 Ohio, 466.

⁵ *Rex v. Tannet*, Russ. & Ry., 351.

⁶ *Rex v. Martin*, Russ. & Ry., 324; *Rex v. Cramp*, Russ. & Ry., 327.

⁷ 1 Arch. C. P. & Pl., 85; *Rex v. Higgins*, 2 East, 5; *Reg. v. Turvey*, Holt, 365.

⁸ 1 Bish. Cr. L., § 767.

⁹ *Rex v. Higgins*, 2 East, 5; *Reg. v. Daniels*, 6 Mod., 99.

¹⁰ *Penn. v. McGill*, Addison, 21; *Reg. v. Collingwood*, 6 Mod., 288.

¹¹ *Rex v. Hickman*, 1 Moody, 34; *Reg. v. Rowed*, 6 Jur., 396.

¹² *State v. Avery*, 7 Conn., 266.

bribe,¹ or to request one to put up a threatening notice,² or advises A, against whom the sheriff has a precept and whom he is about to arrest, to draw a line on the ground and forbid the officer to pass it, asserting at the time that if the sheriff passed the ground and A killed him, the law was on A's side;³ or solicits another to burn a barn,⁴ or to fight with fists⁵ or otherwise,⁶ though no offense is actually committed. But it has been held that the inducing another to commit an act not *per se* penal, as selling liquor at retail without a license,⁸ but made a statutory fine as a matter of municipal regulation, was not indictable;⁹ yet, under our statute, it is presumed the court would hold otherwise. If the crime is actually committed, the person soliciting, aiding, advising or encouraging is an accessory and may be punished as principal.¹⁰

STATEMENT OF THE OFFENSE OF SOLICITING ANOTHER TO COMMIT A CRIME.

(Commence as in form on page 35) that C. D., on, etc., at, etc., in the said county, unlawfully (or "*feloniously*," if the offense to be committed is a felony) did solicit,¹ incite, advise and encourage one E. F. to (*here state the offense to be committed as in the usual form, and conclude as in form on page 35*).

3. OFFENSES AT COMMON LAW.

§ 754. 3. Provisions of the Statute. — "All offenses herein defined shall be prosecuted, and on conviction, punished as by

¹ U. S. v. Worrall, 2 Dall., 384; Hefleton v. Lister, Cas. Prac. C. P., 88.

² Reg. v. Darcey, 1 Crawf. & Dix. C. C., 33.

³ State v. Caldwell, 2 Tyler, 212.

⁴ People v. Bush, 4 Hill, 133.

⁵ Com. v. Whitehead, 2 Bost. L. Rep., 148.

⁶ State v. Farrier, 1 Hawks, 487; State v. Taylor, 4 Brev., 243; State v. Tibbs, 1 Dana, 524, see *ante* § 170.

⁷ Com. v. Willard, 22 Pick., 496.

⁸ Dobkins v. State, 2 Humph., 424; Palse v. State, 5 Humph., 108; Ross v. Com., 2 B. Monr., 417; Rex v. Upton, 2 Strange, 816.

⁹ R. S., 393, § 273; 1 Arch. C. P. & Pl., 84; People v. Bush, 4 Hill, 135.

¹⁰ The particular manner in which the solicitation was made need not be set out. People v. Bush, 4 Hill, 133.

this act¹ is prescribed, and not otherwise; and all offenses not provided for by statute law may be punished by fine or imprisonment, in the discretion of the court: *Provided*, the fine shall in no case exceed five hundred dollars, and imprisonment one year.”²

¹ The act referred to is the criminal code.

² R. S., 395, § 292.

CHAPTER V

PROCEEDINGS IN THE CIRCUIT COURT IN CRIMINAL CASES.

- I. JURISDICTION OF THE CIRCUIT COURT.
- II. THE GRAND JURY.
- III. THE INDICTMENT.
- IV. ARREST UPON INDICTMENT AND ADMITTING TO BAIL.
- V. COUNSEL, MOTION TO QUASH INDICTMENT, ARRAIGNMENT AND PLEAS.
- VI. PROCEEDINGS BEFORE TRIAL.
 - 1. Change of Venue.
 - 2. Procuring the Evidence.
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- VII. THE PETIT JURY.
- VIII. THE TRIAL.
 - 1. Miscellaneous Matters Incident to the Trial.
 - 2. Openings of Counsel.
 - 3. Presence of Prisoner.
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 - 5. Closing Arguments.
 - 6. Instructions.
 - 7. Retiring of the Jury to Deliberate of their Verdict.
 - 8. The Verdict.
 - 9. Reception of the Verdict.
 - 10. Amendment of the Verdict.
 - 11. Motion for a New Trial.
 - 12. Motion in Arrest of Judgment.
- IX. SENTENCE, JUDGMENT, RECORD AND EXECUTION.
 - 1. Sentence and Judgment.
 - 2. The Record.
 - 3. Execution of the Judgment.
- X. WRITS OF ERROR.
 - 1. Bill of Exceptions.
 - 2. Miscellaneous Matters Relating to Writs of Error.

SECTION I

JURISDICTION OF THE CIRCUIT COURT.

§ 755. Provisions of the Statute.

756. Of Cook County.

757. Prosecution to be by Indictment.

758. Local Jurisdiction.

759. Offenses on County Line.

760. Party Killing in One County and Party Killed in Another.

761. Cause Administered in One County, Death Occurring in Another.

762. Jurisdiction in Larceny.

763. Offenses Committed on Navigable Waters of this State.

764. Offenses Commenced Without, but Consummated Within the State.

765. Offense Committed on Railroad Car or Water Craft.

§ 755. Provisions of the Statute. — “The circuit courts of the several counties, except of the county of Cook, shall have exclusive, original jurisdiction of all criminal offenses, except as otherwise provided by law.”¹

§ 756. Of Cook County. — “The criminal courts of Cook county shall have original, exclusive jurisdiction of all criminal offenses in the county of Cook, except such as is conferred upon justices of the peace, and appellate jurisdiction from justices of the peace.”²

§ 757. Prosecution to be by Indictment. — “All offenses cog-

¹ R. S., 406, § 392. A statute giving another court exclusive jurisdiction over misdemeanors is unconstitutional. *Myers v. People*, 67 Ills., 503; *Weatherford v. People*, 67 Ills., 520. As to the construction of the statute of Iowa relating to the jurisdiction in a case of larceny, *State v. Riley*, 28 Iowa, 547, see *State v. Dawson*, 17 Iowa, 584; of trespass, *State v. Shaffer*, 21 Iowa, 486; in a case of an assault with intent of doing great bodily injury, *State v. Carpenter*, 23 Iowa, 506; in a case of assault and battery, *State v. Lee*, 37 Iowa, 402.

² R. S., 406, § 393.

nizable in the said courts shall be prosecuted by indictment.”¹

§ 758. **Local Jurisdiction.** — “The local jurisdiction of all offenses, not otherwise provided for by law, shall be in the county where the offense was committed.”²

§ 759. **Offense on County Line.** — “Where an offense shall be committed on a county line, or within one hundred rods of the same, it may be so alleged, and the trial may be in either county divided by such line; and where any offense shall be committed against the person of another, and the person committing the offense shall be in one county, and the person receiving the injury shall be in another county, the trial may be had in either of the said counties.”³

§ 760. **Party Killing in one County and Party Killed in Another.** — “If the party killing shall be in one county, and the party killed be in another county, at the time the cause of death shall be administered or inflicted, or if it is doubtful in which of several counties the cause of death was administered or inflicted, the accused may be tried in either county.”⁴

§ 761. **Cause Administered in one County, Death Occurring in Another.** — “If the cause of death is administered or inflicted in one county, and the party die within another county, or without the state, the accused shall be tried in the county where the cause of death was administered or inflicted.”⁵

§ 762. **Jurisdiction in Larceny.** — “Where property is stolen in

¹ R. S., 406, § 394.

² Id., § 395.

³ Id., § 396. In Iowa it has been held that a person might be tried in the district court of that state for keeping a house of ill-fame on a boat in the Mississippi river, although such boat when so used for a portion of the time as the water receded, rested upon the soil of an island, on the east side thereof, near the Illinois shore. *State v. Mullen*, 35 Iowa, 199; *Mahler v. Transportation Co.*, 35 N. Y., 352.

⁴ R. S., 407, § 397.

⁵ R. S., 407, § 398. This section of the statute is not in conflict with the provision of the constitution, which secures to a person accused the right to a “trial by an impartial jury of *the county or district* in which the offense is alleged to have been committed.” R. S., 60, § 9; *State v. Pauley*, 12 Wis., 599.

another state or county, and brought into this state, or is stolen in one county of this state, and carried into another, the jurisdiction shall be in any county into or through which the property may have passed, or where the same may be found.”¹

§ 763. **Offense Committed on Navigable Waters of this State.**— “An offense committed on any of the navigable waters bordering on this state, and within the jurisdiction of the state, may be alleged to have been committed, and the offender may be tried in the county opposite which it was committed, or in any county through or into which the boat, raft or vessel, (if committed on either,) may pass or come in the course of the voyage, or in which the voyage may terminate.”²

§ 764. **Offense Commenced without but Consummated within the State.**— “When the commission of an offense commenced without this state is consummated within this state, the offender shall be liable to punishment therefor in this state, though he was without the state at the time of the commission of the offense charged, if he consummated the offense within this state through the intervention of an innocent or guilty agency, or any means proceeding directly or indirectly from himself; and in such case he may be tried and punished in the county where the offense was consummated.”³

§ 765. **Offense Committed on a Railroad Car or Water-Craft.**— “When any offense is committed in or upon any railroad car passing over any railroad in this state, or any water-craft navigating any of the waters within this state, and it cannot readily be determined in what county the offense was committed, the offense may be charged to have been committed and the offender tried in any of the counties through or along or into which such railroad car or water-craft may pass or come, or can reasonably be determined to have been on or near the the day when the offense was committed.”⁴

¹ R. S., 407, § 399.

² Id., § 400.

³ Id., § 401.

⁴ Id., § 402.

SECTION II.

THE GRAND JURY.

§ 766. Number.

767. How Selected and Summoned.

768. Qualifications.

769. Appointment and Power of Foremen—Grand Jurors to be Sworn.

770. Grand Jury to Retire to their Room in Charge of an Officer Appointed by the Court—May Appoint one of their own Number to Keep Minutes.

771. Witnesses.

772. Evidence.

773. Objections to the Grand Jury, How and When Taken.

774. Objections to the Mode of Summoning or Impaneling the Grand Jurors, How and when Taken.

§ 766. Number. — “A full panel of the grand jury consists of twenty-three persons, of whom sixteen are sufficient to constitute a grand jury.”¹ In finding a bill of indictment, at least sixteen of the grand jury must be present and at least twelve of them must agree to the finding.²

§ 767. How Selected and Summoned. — The grand jurors are selected by the county board and summoned as required by statute.³ If they are dismissed before the court adjourns they may be summoned again on any special occasion at such time as the court directs.⁴

§ 768. Qualifications. — Each grand juror the statute requires to be an inhabitant of the town or precinct, not exempt from serving on juries, of the age of twenty-one years or upwards, and under sixty years old, in the possession of

¹ R. S., 634, § 16; see *Norris House v. State*, 3 Greene Iowa, 513.

² R. S., 408, § 407; *Id.*, 634, § 17; *State v. Ostrander*, 18 Iowa, 442

³ R. S., 631, § 9.

⁴ *Id.*, 407, § 405.

his natural faculties and not infirm or decrepit, free from all legal exceptions of fair character, of approved integrity, of sound judgment, well informed, and to be one who understands the English language.¹

§ 769. **Appointment and Power of Foreman**—Grand Jurors to be Sworn.—After the jury is impaneled it is the duty of the court to appoint a foreman who has power to swear or affirm witnesses to testify before the jury. Before entering upon the discharge of their duties the members of the grand jury are required to take an oath.²

FORM OF OATH TO BE ADMINISTERED THE FOREMAN³.

You, as foreman of this inquest, do solemnly swear (*or "affirm," as the case may be*) that you will diligently inquire into and a true presentment make of all such matters and things as shall be given you in charge, or shall otherwise come to your knowledge, touching the present service; you shall present no person through malice, hatred or ill will; nor shall you leave any unpresented through fear, favor or affection or for any fee or reward, or for any hope or promise thereof; but in all of your presentments you shall present the truth, the whole truth and nothing but the truth, according to the best of your skill and understanding: so help you God.

FORM OF OATH TO BE ADMINISTERED TO THE OTHER GRAND JURORS.

The same oath that A. B. your foreman has just taken before you on his part, you and each of you shall well and truly keep and observe on your respective parts, so help you God.

§ 770. **Grand Jury to Retire to their Room in Charge of an Officer Appointed by the Court**—May Appoint one of their Number to keep Minutes.—The grand jury, after having been impaneled, sworn and instructed by the court, are required by statute to retire to their room to consider such matters as may be brought before them. It is the duty of the court to designate an officer to attend them.⁴ They may appoint one of their number

¹ R. S., 531, § 9; Id., 630, § 2.

² Id., 634, § 17.

³ The form prescribed by statute. R. S., 634, § 18.

⁴ R. S., 407, § 403.

to take minutes of their proceedings to be delivered to the prosecuting attorney if the jury so directs.¹

§ 771. **Witnesses.**—"In all complaints exhibited before the grand jury of any county, they shall hear the witnesses on behalf of the people only."²

§ 772. **Evidence.**—"The grand jury may find an indictment on the oath of one or more witnesses, except that in cases of treason or perjury, at least two witnesses to the same fact shall be deemed necessary, except where the fact is proved by some writing; or they may make a presentment upon information of not less than two of their own body, unless the juror giving the information is sworn as a witness, in which case his evidence shall be considered the same as any other witness."³

§ 773. **Objections to the Grand Jury—How and when Taken.**—At common law, and in most of the states, a person charged with crime and held to bail,⁴ or under arrest⁵ to answer to an indictment to be found by the grand jury at a particular term, or notified by the prosecuting officer that he will lay his case before such grand jury,⁶ has a right to be present at the organization of such jury and present challenges either to the array⁷ or to the polls; and if any of the jurors are disqualified by reason of having formed and expressed an opinion as to the guilt of such person, or otherwise, to have such jurors excluded from the jury while acting upon

¹ R. S., § 404.

² Id., § 406.

³ R. S., 408, § 407; Id., 634, § 19.

⁴ *Com. v. Clark*, 2 Brown, 223; *Jones v. State*, 2 Blackf., 475; *State v. Hemdon*, 5 Blackf., 75; *Bellair v. State*, 6 Blackf., 104; *Vanhook v. State*, 12 Texas, 252; *State v. Duncan*, 7 Yerg., 271; *State v. Rickey*, 5 Halst., 83.

⁵ *Com. v. Smith*, 9 Mass., 107; *People v. Roberts*, 6 Cal., 214; *Maher v. State*, 3 Minn., 444; *State v. White*, 17 Texas, 242; *State v. Ostrander*, 18 Iowa, 435; *Thayer v. People*, 2 Doug. Mich., 417; *Hudson v. State*, 1 Blackf., 317; *Com. v. Smith*, 9 Mass., 107; *State v. Rockafellow*, 1 Halst., 332; *Gross v. State*, 2 Carter Ind., 329.

⁶ *U. S. v. Blodgett*, 35 Ga., 336.

⁷ *Vanhook v. State*, 12 Texas, 252; *State v. Martin*, 2 Ired., 101; *State v. Duncan*, 6 Ired., 98; *State v. Barroune*, 25 Missis., 203.

his case.¹ But our statute provides that no indictment shall be quashed by reason of the disqualification of any grand juror.² Just how far this provision of the statute affects the right of the accused to object to the disqualification of a grand juror before the finding of the indictment, in the absence of judicial construction, does not seem clear. Yet it is certain that no objection on the account of the disqualification of a grand juror, can be made available unless it is made before the indictment is found,³ even though the person indicted was not apprised of any intended proceedings against him, and therefore had no opportunity to make his challenge.⁴

§ 774. **Objections to the Mode of Summoning or Impaneling the Grand Jurors—How and when Taken.**—Objections to the mode of summoning or impaneling a grand or petit jury should be taken by a challenge to the array or by motion to quash the indictment, founded upon an affidavit of some irregularity,⁵ or possibly by a plea in abatement.⁶ Such objection, or that there were not a sufficient number of jurors to constitute a grand jury, cannot be incorporated into the record of the cause un-

¹ *Com. v. Clark*, 2 Brown, 223; *People v. Jewett*, 3 Wen., 314; *State v. Gillick*, 7 Iowa, 287; *State v. Quimby*, 51 Me., 395; *State v. Hinkle*, 6 Iowa, 380; *State v. Cole*, 17 Ills., 674; *contra*, *Baldwin's Case*, 2 Tyler, 473; *State v. Clarissa*, 11 Ala., 57; *State v. Hughes*, 1 Ala., 655; *Com. v. Tucker*, 8 Mass., 286; *State v. Rickey*, 5 Halsted, 83.

² R. S., 408, § 411.

³ *Dixon v. State*, 3 Iowa, 416; *State v. Harris*, 38 Iowa, 242; *Com. v. Smith*, 9 Mass., 107; *Boyington v. State*, 2 Port., 100; *contra*, *State v. Middleton*, 5 Port., 484; *State v. Segar*, 7 Porter, 167; *State v. Clarissa*, 11 Ala., 57; *Com. v. St. Clair*, 1 Grat., 556.

⁴ *People v. Jewett*, 3 Wen., 314; *Thayer v. People*, 2 Doug. Mich., 417; *U. S. v. White*, 5 Cranch C. C., 457; *contra*, *People v. Beatty*, 14 Cal., 566.

⁵ *Stone v. People*, 2 Scam., 326; *Peri v. People*, 65 Ills., 21; *State v. Hart*, 29 Iowa, 268; *State v. Felter*, 25 Iowa, 67; *State v. Gillick*, 10 Iowa, 98; *State v. Howard*, 10 Iowa, 101; *State v. Brooks*, 9 Ala., 10; *Barney v. State*, 12 Sm. & M., 68; *McQuillan v. State*, 8 Sm. & M., 587; *Rawle v. State*, 8 Sm. & M., 599; *State v. Symonds*, 36 Me., 128; *State v. Martin*, 2 Ired., 101; *State v. Duncan*, 6 Ired., 98.

⁶ *Norris House v. State*, 3 Greene Iowa, 514; *Byrne v. State*, 12 Wis., 523-4; *Newman v. State*, 14 Wis., 393; *State v. Cole*, 17 Wis., 696; *State v. Duncan*, 7 Yerg., 527; *State v. Bryant*, 10 Yerg., 271, *Com. v. Thompson*, 4 Leigh, 667; *State v. Newer*, 7 Blackf., 307, *post* § 832.

less raised in one of these ways. Objections of this nature cannot be taken on a motion for a new trial,¹ or after a plea to the merits² if the grounds of the objection are known to the defendant before.³ Where a grand juror, regularly selected and summoned, was excused and permitted to select another as a substitute who filled his place in the panel, it was held that the vacancy was filled in an irregular manner.⁴

¹ *Stone v. People*, 2 Scam., 326; *State v. Kimball*, 29 Iowa, 267.

² Whart. Cr. L., § 472; *State v. Greene*, 20 Iowa, 424; *Byrne v. State*, 12 Wis., 524; *People v. Griffin*, 2 Barb., 427; *State v. Rand*, 33 N. H., 216; *contra*, *State v. Mahan*, 12 Texas, 283; *Doyle v. State*, 17 Ohio, 222.

³ *State v. Clarissa*, 11 Ala., 57; *State v. Martin*, 2 Ired., 101; *State v. Bowman*, 25 Missis., 203; *State v. Leaben*, 4 Dev., 305; *State v. Freeman*, 6 Blackf., 248; *State v. Motley*, 7 Rich., 327.

⁴ *State v. Howard*, 10 Iowa, 101.

SECTION III.

THE INDICTMENT

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§ 775. **Definition.** — An indictment is a written accusation presented on oath by at least twelve of the grand jury, charging a person named therein with a crime which it specifically defines, and returned by the grand jury into court, where it becomes a matter of record.¹

§ 776. **Constitutional Provisions.** — The Provisions in the Constitution of the United States requiring prosecutions for crimes to be by indictment, relate only to proceedings before the tribunals of the United States, and do not apply to proceedings in the state courts.²

§ 777. **Continued.** — The constitution of the state of Illinois provides that “all prosecutions shall be carried on: *In the name and by the authority of the People of the State of Illinois; and conclude Against the peace and dignity of the same.*”³ It is sufficient for an indictment to conclude “against the peace and dignity of the people of the state of Illinois;” for it is not necessary to comply literally with this provision of the constitution; if the substance of it is complied with, that is all that is required.⁴

§ 778. **Due Process of Law.** — The constitution of the state of Illinois provides that “No person shall be deprived of life,

¹ Bish. Cr. P., § 131.

² Twitchell v. Com., 7 Wal., 321; Jane v. Com., 3 Met. Ky., 18, 23; Rowan v. State, 30 Wis., 149.

³ R. S., 73, Const. of Ills., Art. VI., § 33; Whitesides v. People, Breese, 4; McFadden v. Foster, 20 Ills., 515.

⁴ Zarresseller v. People, 17 Ills., 104; Morton v. People, 47 Ills., 469.

liberty or property without due process of law.”¹ The words “without due process of law,” are technical words, having a fixed and a definite meaning, and mean “without indictment or presentment of good and lawful men, or by writ original of the common law,² and trial had according to the prescribed forms and solemnities of the common law for ascertaining the guilt or innocence of a party, or determining the title to property.”³ Therefore, this provision of the constitution seems to forbid the depriving a person of his life or liberty without first procuring against him an indictment substantially in the form prescribed by the common law.

§ 779. What Facts must be Substantially Alleged — In all Criminal Prosecutions the Accused shall have the Right * * * to Demand the Nature and Cause of the Accusation and to Have a Copy thereof.⁴—This provision of the constitution of this state, the provision contained in the next preceding section,⁵ and the provision that “No person shall be held to answer for a criminal offense unless on an indictment of a grand jury, except in cases in which the punishment is by fine or imprisonment, otherwise than in the penitentiary, in cases of impeachment, and in cases arising in the army and navy or in the militia, when in actual service, in time of war or public danger,”⁶ guarantee to all persons held for crimes, of whatever sort, with the exceptions specified,⁷ that before they shall be convicted, there shall be an allegation against them of every element of crime which the law makes essential to the punishment to be inflicted.⁸

¹ R. S., 59, Const. of Ills., Art. II., § 2.

² 2 Inst., 45, 50; 2 Story on Const., § 1789.

³ Taylor v. Porter, 4 Hill, 146; Hoke v. Henderson, 4 Dev., 1; Jones v. Perry, 10 Yerg., 59; Wynehammer v. People, 13 N. Y., 390, 416; People v. Haws, 37 Barb., 455; Sullivan v. City of Oneida, 61 Ills., 243; Rowan v. State, 30 Wis., 148; Jones v. Robbins, 8 Gray, 329.

⁴ R. S., 60, Const. of Ills., Art. II., § 9. A misdemeanor is a crime, Van Meter v. People, 168; therefore this provision applies to misdemeanors.

⁵ R. S., 59, Const. of Ills., Art. II., § 2.

⁶ Id., 60, § 8.

⁷ Bryan v. State, 4 Iowa, 350.

⁸ 1 Bish. Cr. P., § 88; Torrey v. People, 17 Ills., 105; Chambers v. People, 4 Scam., 359, 360; but see State v. Bevans, 37 Iowa, 108.

§ 780. *Continued — Technical Objections may be Removed by Statute.*—The provisions of the constitution to which we have referred do not prevent the legislature from regulating the form of the indictment;¹ but they do prohibit the legislature from making an indictment good and sufficient, which does not contain an allegation of every material and substantial fact required to complete the offense.² So a statute may take away any purely technical objection to an indictment which does not prejudice the substantial rights of the defendant.³

§ 781. *Certainty.* — “The Nature and Cause of the Accusation,” which the accused has a right to demand under the constitution, is such a certain description of the offense charged, and statement of the facts by which it is constituted, as will fully identify the accusation, so that the party may not be indicted for one thing and tried for another, and also a statement of all the facts which constitute the offense intended to be charged, with such certainty and precision that the defendant may judge whether they constitute an indictable offense or not, and may demur or plead accordingly, and may plead his conviction or acquittal in bar of another prosecution for the same offense.⁴

§ 782. *Provisions and Construction of the Statute as to the Form of the Indictment.* — The statute provides that “every indict-

¹ *State v. Mullen*, 14 La. An., 570; *State v. Learned*, 47 Me., 426; *Miller v. People*, 2 Scam., 233; *Cannady v. People*, 17 Ills., 158; *Morton v. People*, 47 Ills., 468; *Rowan v. State*, 30 Wis., 149.

² *Hewitt v. State*, 25 Texas, 722; *State v. Willburn*, 25 Texas, 738; *State v. Horan*, 25 Texas Sup., 271; *State v. Learned*, 47 Me., 426; *Murphy v. State*, 24 Missis., 590; 28 Missis., 637; *Norris v. State*, 33 Missis., 373; *Fink v. Milwaukee*, 17 Wis., 27; *contra*, *Noles v. State*, 24 Ala., 672; *Thompson v. State*, 25 Ala., 41; *Green v. State*, 41 Ala., 419; *Wickhamer v. State*, 7 Cold., 525; *State v. Comstock*, 25 Vt., 553.

³ *Rowan v. State*, 30 Wis., 149; *Com. v. Hall*, 97 Mass., 570; *People v. Mariposa Co.*, 31 Cal., 196.

⁴ *Fink v. Milwaukee*, 17 Wis., 27; *Lequat v. People*, 11 Ills., 331; *People v. Taylor*, 3 Denio, 96; *Murphy v. State*, 24 Missis., 594; 28 Missis., 637; *Norris v. State*, 33 Missis., 373; *Morton v. People*, 47 Ills., 471, and authorities there cited; *Torrey v. People*, 17 Ills., 106; *Sullivan v. Oneida*, 61 Ills., 244; *Whitesides v. People*, Breese, 4, 2d Ed., 21; *Willis v. People*, 1 Scam., 401.

ment or accusation of the grand jury shall be deemed sufficiently technical and correct which states the offense in the terms and language of the statutes creating the offense,¹ or so plainly that the nature of the offense may be easily understood by the jury.”² This statute should be so construed as not to deprive the accused of any of the rights guaranteed to him by the constitution.³ It has been held that the provisions of similar statutes did not dispense with the leading requisites of indictments.⁴

§ 783. *Continued*—**What not a Sufficient Statement of an Offense.**—Where the offense is not created by statute it is not always sufficient to state the offense in the language of the statute defining the common-law offense and prescribing its punishment, even though stated so plainly that the nature of the offense may be easily understood by the jury, for the reason that this is not such a statement of the nature and cause of the accusation as the constitution requires. Thus an indictment for murder, stating “that C. D. unlawfully killed a human being, with malice aforethought, either express or implied,” in the language of the statute would not be claimed by any respectable lawyer to be good, although from such statement the nature of the offense might be easily understood by the jury. Yet from the language used by some of the judges it might be inferred that they would hold such an indictment to be good.⁵ There is nothing in the statute de-

¹ *Miller v. People*, 2 Scam., 243; *Quigly v. People*, 2 Scam., 201; *Jones v. People*, 2 Scam., 477; *Eells v. People*, 4 Scam., 498; *People v. Baughman*, 18 Ills., 153; *Mohler v. People*, 24 Ills., 26; *Chambers v. People*, 4 Scam., 351; *Nash v. State*, 2 Greene Iowa, 286; *House v. State*, 4 Greene Iowa, 172; *State v. Hessenkamp*, 17 Iowa, 25; *State v. Baldy*, 17 Iowa, 39.

² R. S., 408, § 408; *Conoly v. People*, 3 Scam., 474; *Eells v. People*, 4 Scam., 498; *Swain v. People*, 4 Scam., 178; *Chambers v. People*, 4 Scam., 351; *State v. Seamons*, 1 Greene Iowa, 418; *State v. Morse*, 1 Greene Iowa, 503; *Buckley v. State*, 2 Greene Iowa, 162; *Winfield v. State*, 3 Greene Iowa, 339; *State v. Middleton*, 11 Iowa, 248; *State v. Ansaleme*, 15 Iowa, 46; *State v. Conlee*, 25 Iowa, 237; *State v. Schill*, 27 Iowa, 263.

³ *Ante* §§ 778-780; see *State v. Morse*, 1 Greene Iowa, 503.

⁴ *State v. Callendine*, 8 Iowa, 289.

⁵ *Swain v. People*, 4 Scam., 178; *People v. Baughman*, 18 Ills., 152; *Mohler*

fining and punishing the offense of an assault with intent to murder, requiring the name of the person injured to be stated, but the courts have held that the name of the injured person must be set forth in the indictment, for without such statement the offense would not be sufficiently identified.¹ So in an indictment for larceny the name of the owner of the stolen property must be stated though the offense may be stated in the terms and language of the statute without giving the name.² These cases are cited (and many more might be cited) simply to show that it is not always sufficient to state an offense in the language of the statute defining it and prescribing its punishment.

§ 784. **Offense Should not be Stated in the Disjunctive—Exception.**—The offense must not be stated in the disjunctive so as to leave it uncertain as to what is really intended to be relied upon as the accusation;³ the only exception to this rule being where the word “or,” in the statute defining the offense, is used in the sense of, *to wit.*, that is, in explanation of what precedes, and making it signify the same thing.⁴

§ 785. **Certainty, what Sufficient.**—An indictment must state the facts constituting the crime with as much certainty as the nature of the case will admit.⁵ But certainty to a common intent has been held sufficient.⁶ It must charge the accused with a particular specified offense, and not with being an offender in general.⁷ Therefore an indictment charging a man with being a common thief⁸ is not sufficient.

§ 786. **Facts not to be Stated Argumentatively.**—The facts con-

v. People, 24 Ills., 26; *Morton v. People*, 47 Ills., 474; *State v. Chambers*, 2 Greene Iowa, 308.

¹ *Vandermark v. People*, 47 Ills., 122; *Willis v. People*, 1 Scam., 399.

² *Willis v. People*, 1 Scam., 490; see also *Thompson v. People*, 24 Ills., 65.

³ 1 Chitty Cr. L., 231.

⁴ *Clifford v. State*, 29 Wis., 329; *Brown v. Com.*, 8 Mass., 59; *State v. Gilbert*, 13 Vt., 647; *Com. v. Gray*, 2 Gray, 502.

⁵ 1 Chitty Cr. L., 171.

⁶ *Com. v. Dedham*, 16 Mass., 141; *U. S. v. La Coste*, 2 Mason, 140.

⁷ 1 Chitty Cr. L., 229.

⁸ 1 Id., 230; 1 Bish. Cr. P., § 530.

stituting the offense must not be stated argumentatively,—that is left to be inferred from the facts stated,—but must be stated in express and positive language.¹

§ 787. **Presumptions, Conclusions of Law, Facts Judicially Noticed, and Matters of Evidence or Defense**, need not be Stated in the Indictment. — Presumptions of law need not be stated,² neither need facts of which the court will *ex officio* take notice.³ It is not necessary to state a conclusion of law resulting from the facts of a case, for when the facts are stated, it is the duty of the court to draw the proper legal inference.⁴ Neither is it necessary or proper to state matter of evidence which the prosecutor proposes to adduce unless it alters the offense.⁵ In general, all matters of defense must come from the defendant, and need not be anticipated or stated in the indictment.⁶

§ 788. **Recital.**—The charge must be expressed positively, and not with a “that whereas,” or “by way of recital,”⁷ unless the matter is merely introductory or collateral, or stands as the inducement to something else, in which case the pleader is permitted, if he chooses, to introduce it indirectly by the use of such a word as “whereas.”⁸ An objection to the sufficiency of an indictment, because a certain fact appears by way of recital and not by positive averment, goes to the manner of pleading the fact, and not to the fact itself, and therefore must be taken advantage of by motion to quash the indictment before trial.⁹

§ 789. **Technical Words.**— There is a dicta of the court saying in substance that the statute dispenses with the technical

¹ 1 Chitty Cr. L., 231.

² Id.

³ Id.

⁴ Id.; 5 Leach, 941.

⁵ 1 Chitty Cr. L., 231*a*.

⁶ Id.

⁷ Id., 231; Rex v. Crowhurst, 2 Ld. Raym., 1363; Rex v. Whitehead, 1 Salk., 371.

⁸ 1 Chitty Cr. L., 231; 1 Bish. Cr. P., § 555; Reg. v. Wyatt, 2 Ld. Raym., 1189; Reg. v. Godard, 3 Salk., 171.

⁹ Townsend v. People, 3 Scam., 326.

terms used at common law,¹ which may possibly be the law of this state. The omission of these terms would not deprive the defendant of any substantial or practical benefit, unless it be a part of the description of the offense as defined by statute² or required in stating some fact constituting a material element of the offense. There are, however, several cases in this state recognizing the necessity of these technical words,³ and it would be safer to insert them when required at common law, until the question as to their necessity shall be clearly decided by the courts.

§ 790. **Feloniously.** — Unless the statute⁴ has changed the common law, the word “feloniously” must be used in all cases of felony at common law⁵ or made felony by statute.⁶ And if this word be omitted in a charge for carrying away grain, the offense will be trespass.⁷ But in cases of misdemeanors the use of the word “feloniously” is unnecessary in charging the offense, though it does not vitiate the indictment.⁸ If the word “feloniously” is used in the statute defining the offense it must be used in an indictment for such offense.⁹

§ 791. **Knowingly — Unlawfully — Willfully — Maliciously.** — The word “knowingly” or the words “well knowing” will supply the place of a positive averment that the defendant knew the facts subsequently stated.¹⁰ If knowledge is unnecessarily alleged the allegation may be rejected as surplusage.¹¹ The word “unlawfully” is unnecessary where the crime existed at

¹ *Quigley v. People*, 2 Scam., 302; *Miller v. People*, 2 Scam., 233.

² *Caps v. State*, 4 Iowa, 503.

³ *Curtis v. People*, Breese, 256; 1 Scam., 285; *Fairlee v. People*, 11 Ills., 1.

⁴ R. S., 408, § 408; *ante* § 789.

⁵ 1 Chitty Cr. L., 242; 1 Bish. Cr. P., § 534; *Curtis v. People*, Breese, 197, 2d Ed., 259; 1 Scam., 289; *Stuart v. Com.*, 12 Serg. & R., 177; *Killenbeck v. State*, 10 Md., 431.

⁶ *Jane v. State*, 3 Mo., 61; *State v. Gilbert*, 24 Mo., 380; *Williams v. State*, 8 Humph., 585; *Cain v. State*, 18 Texas, 387.

⁷ 1 Chitty Cr. L., 242; *Moore v. Watts*, Breese 18, 2d Ed., 42.

⁸ *Miller v. People*, 2 Scam., 233; *Quigley v. People*, 2 Scam., 301.

⁹ *State v. Tate*, 6 Humph., 424; *State v. Johnson*, 6 Humph., 426.

¹⁰ 1 Chitty Cr. L., 241; 1 Bish. Cr. P., § 504.

¹¹ 1 Bish. Cr. P., § 504; 2 East, 452.

common law, and is manifestly illegal.¹ But if it is used in the statute describing the offense which it creates, an indictment founded on the act will be bad if omitted.² The word "willfully" sometimes means little more than intentionally or designedly.³ Yet it is more frequently understood to extend a little further and approximate the idea of a milder kind of malice and in the sense in which it is used in the statute, means corruptly, with a bad purpose;⁴ but in an indictment on a statute containing the words "willfully" and "corruptly" both words are essential because they are the statutory words.⁵ The word "maliciously" means all that the word "willfully" does and more,⁶ and therefore may be substituted for it in describing the offense;⁷ but since the word "maliciously" means more than the word willfully, the former word will not supply the place of the latter in the statute.⁸ Where a statute makes criminal the doing of an act "willfully and maliciously," it is not sufficient to charge in the indictment that it was done "feloniously" and "unlawfully," or "feloniously, unlawfully and willfully," for these words are not synonymous, equivalent or substantially the same,⁹ nor of the same legal import, as those used in the statute. Where the words used in the statute were "unlawfully and maliciously," an indictment using the words "feloniously, willfully and maliciously," was held

¹ 1 Chitty Cr. L., 241; 1 Bish. Cr. P., § 503; *Jerry v. State*, 1 Blackf., 396; *State v. Bray*, 1 Mo., 180; *Perry v. People*, 14 Ills., 499; *State v. Williams*, 3 Foster, 321; *Capps v. State*, 4 Iowa, 302; *State v. Vt. Cent. R. R.*, 1 Williams, 103.

² *Curtis v. People*, Breese, 197, 2d Ed., 256, 1 Scam., 285; *Perry v. People*, 14 Ills., 499.

³ 2 Moody & Ry., 339; 9 Met., 268; *Harrison v. State*, 37 Ala., 154; *Capps v. State*, 4 Iowa, 502.

⁴ 20 Pick., 206, 220.

⁵ *Rex v. Cox*, 1 Leach, 71; *Rex v. Taylor*, 1 Show, 190; and see *Rex v. Richards*, 7 Dowl. & Ry., 663; *Rex v. Stevens*, 5 B. & Cres., 246.

⁶ *Chapman v. Com.*, 5 Whart., 427.

⁷ *Id.*; *contra*, 1 Bish. Cr. L., 617; 1 Leach, 493.

⁸ 2 Bish. Cr., P., § 43; *State v. Gove*, 34 N. H., 510.

⁹ *State v. Gove*, 34 N. H., 510.

bad because the statute words were not used.¹ But according to some of the authorities the word "feloniously" includes and means more than either of the words "unlawfully,² willfully" or maliciously," and may be substituted for them.⁴ Where the words of the statute were "feloniously, unlawfully and maliciously," and the words of the indictment were "feloniously, voluntarily and maliciously" the variance was held fatal.⁵

§ 792. *Time*.—The day, month, and year on which the offense was committed must be stated in an indictment,⁶ though it is not necessary to prove the precise day or year as alleged.⁷ An indictment alleging an offense to have been committed on an impossible day,⁸ or a day subsequent to the finding of the bill, is defective.⁹ An indictment may be found for a crime committed after the commencement of the term to which it is returned.¹⁰

§ 793. *Then and There*.—As a general rule the time and place of every material fact must be plainly and consistently alleged,¹¹ and any uncertainty or incongruity in the description of the time and place will vitiate the indictment.¹² After the time and place has been once named with certainty, it is afterwards sufficient to refer to it by the words "then and there," which have the same effect as if the day and year and the name of

¹ *Rex v. Ryan*, 7 Car. & P., 854; 2 *Moody*, 15; *Jarnagin v. State*, 10 Yerg., 529; *Anthony v. State*, 13 Sm. & M., 263.

² *Perry v. People*, 14 Ills., 499.

³ 2 Bish. Cr. P., §§ 543, 545.

⁴ 3 Wils., 318; 2 W. Blk., 842; 5 East, 244; 2 Marshall, 1 Bish. Cr. P., 618. n. 7.

⁵ *Jesse v. State*, 28 Missis., 100.

⁶ *Whitesides v. People*, Breese, 4, 2d Ed., 21; *State v. Beckwith*, 1 Stewart, 318; *People v. Littlefield*, 5 Cal., 355.

⁷ *Gebhart v. Adams*, 23 Ills., 399; *Koop v. People*, 47 Ills., 327; *State v. Freeman*, 8 Iowa, 428; *State v. Malling*, 11 Iowa, 239; *State v. Curley*, 33 Iowa, 359; *Com. v. Dacy*, 107 Mass., 206.

⁸ 1 Whart. Cr. L., 274.

⁹ *Peris v. McKee*, Add., 36; *Jacobs v. Com.*, 5 Serg. & R., 316; *State v. Munger*, 15 Vt., 291; *Com. v. Doyle*, 110 Mass., 103.

¹⁰ *Allen v. State*, 5 Wis., 329.

¹¹ 1 Bish. Cr. P., § 386; *Martin v. State*, 6 Humph., 204.

¹² 1 Stark. Cr. Pl., 2d Ed., 54.

the place were actually repeated.¹ In some cases the words "then and there" are more certain than even a repetition of the day and year,² for the latter will not be sufficient where, in order to complete the offense connected, acts must be shown to be done at the same time, but the terms "then and there" must be adopted.³ Sometimes the word "and" so connects the allegations of two material facts as to sufficiently apply the time and place to each.⁴ But the mere conjunction "and" without adding "then and there" will in many cases be insufficient.⁵ If, however, the words "then and there" precede every material allegation it is sufficient; those words may not precede the conclusions drawn from the facts.⁶ Where more times than one have been mentioned in the indictment it is not sufficient in an allegation following to use the words "then and there," because it is uncertain to which of the times previously named they refer.⁷

§ 794. *Aforesaid—Said—Same—Until.*—The word "aforesaid" generally refers to the last antecedent, but not so invariably as the word "same," which is more explicit.⁸ And matters stated in parenthesis save the rule of grammar that the words "said" and "aforesaid" refer to the last antecedent.⁹ But words of reference, as "then and there,"¹⁰ "aforesaid" and "said"¹¹ will not be referred to the last antecedent if the sense requires that they should be referred to some prior antecedent. Espe-

¹ 2 Hale P. C., 178; 1 Bish. Cr. P., § 408; *Stout v. Com.*, 11 Serg. & R., 177; *State v. Cotton*, 4 Foster, 143; *State v. Bailey*, 21 Mo., 482.

² *State v. Williams*, 4 Ind., 235.

³ 1 Chitty Cr. L., 221; 1 Bish. Cr. P., 412; *Edwards v. Com.*, 19 Pick., 124; *Com. v. Buttrick*, 100 Mass., 12.

⁴ 2 Hale P. C., 178; 2 Hawks P. C., 23, § 88; *Cro. Eliz.*, 739; 4 Co., 41b; *Dyer*, 69a, Godb., 65, 1 East P. C., 346; *Jackson v. People*, 18 Ills., 269; *Com. v. Doharty*, 10 Cush., 52.

⁵ 1 Bish. Cr. P., § 408; *Whart. Cr. L.*, § 272.

⁶ 1 Leach, 529; *Doug.*, 212; *State v. Johnson*, 1 Walker Missis., 392.

⁷ *State v. Hays*, 24 Mo., 358; *Jane v. State*, 3 Mo., 61; *State v. Jackson*, 3 Me., 291.

⁸ 11 East, 513; 1 Bish. Cr. P., 512.

⁹ 1 Chitty Cr. L., 173; 4 Harg. St. Tr., 747.

¹⁰ *Jeffries v. Com.*, 12 Allen, 145, 152; *Lammers v. Meyer*, 59 Ills., 215.

¹¹ 1 Bish. Cr. P., § 355; *Roswell's Case*, 10 Howell St. Tr., 147, 299.

cially is this so if such reference will make the indictment insensible or bad.¹

§ 795. *Immediately.*—The word “immediately” is too uncertain an allegation when time constitutes any part of the offense. This word has great latitude and is not of any determinate signification, and is frequently used to import as soon as it could conveniently be done.²

§ 796. *Being.*—The word “being” will, unless necessarily connected with some other matter, relate to the time of the indictment rather than of the offense; and therefore an indictment for a forcible entry on land, being the prosecutor’s freehold, without saying, “then being” was held insufficient.³

§ 797. *Divers Days and Times.*—If the offense is of such a nature that it must necessarily have been committed in one day an allegation that it was committed on divers days and times is bad,⁴ but if an offense is alleged to have been committed on a day certain, and on divers other days and times, the allegation is sufficient, for the words “on divers other days and times” may be rejected as surplusage.⁵ Where the offense is continuing or requires more days than one to commit it, the proper form of the allegation is “on, etc., and “on divers other days and times, between that day and the day of taking this inquisition,”⁶ etc., or “on, etc., and on divers other days and times as well before as afterwards, was and yet is,” or “on, etc., and from said day until the day of find-

¹ *Com. v. Call*, 21 Pick., 515, 521.

² 1 Bish. Cr. P., § 409; 1 Whart. Cr. L., § 272; *Cas. Temp. Hardw.*, 114, 115; *contra*, *Streeter v. Streeter*, 43 Ills., 165; *State v. Cherry*, 2 Murphy, 7.

³ 1 Bish. Cr. P., § 410.

⁴ *Rex v. Roberts*, 4 Mod., 101; *State v. Brown*, 2 Murphy, 224; *State v. Walker*, 2 Murphy, 229; *State v. Hays*, 24 Missis., 358; *Hampton v. State*, 8 Ind., 336; *State v. Hendricks, C. & N.*, 369.

⁵ *People v. Adams*, 17 Wen., 475; *Cook v. State*, 11 Ga., 53; *Com. v. Pray*, 13 Pick., 359; *State v. Woodman*, 3 Hawks, 384; *Nichols’ Case*, 7 Grat., 589; *Rex v. Dixon*, 10 Mod., 335, 337; *State v. Munger*, 15 Vt., 290; *Com. v. Bryden*, 9 Met., 137; *Com. v. Wolcott*, 110 Mass., 67; *contra*, *State v. Temple*, 38 Vt., 37.

⁶ *House v. State*, 4 Greene Iowa, 172.

ing this indictment, and on each and every one of said days.”¹ This form of an allegation of time is called a *continuando*. If the offense is one which is not continuing and must necessarily be completed at one time, a count in an indictment in which it is alleged to have been committed on different days,² or in the interval between two days specified, is bad for uncertainty.³ If, however, the offense is such that it might be committed in parts and each part be committed on a separate day, the actual time of committing each part may be alleged, and it will not vitiate the indictment.⁴ In proceeding by indictment for a nuisance without the *continuando* there can be no judgment for the abatement.⁵

§ 798. **Useless Words.** — The words “force and arms” were formerly supposed to be necessary where force and violence had been used.⁶ But under our statute they are not necessary in charging a criminal offense.⁷ The following words sometimes used in indictments are unnecessary, “not having the fear of God before his eyes, but being moved and seduced by the instigation of the devil;”⁸ “to the great damage of the party particularly injured by the offense;” “to the evil example of all others;” and “to the great displeasure of the Almighty God.”⁹

§ 799. **Counts.** — It is usual and proper to make several distinct and separate statements of the same offense or transaction in different ways in an indictment, so that should the evidence on the trial be different from what was expected there may be no variance between the proof and the allega-

¹ *State v. Allen*, 32 Iowa, 248.

² *Com. v. Adams*, 1 Gray, 481; *State v. Temple*, 38 Vt., 37; *State v. Hendricks*, Conference, 369; *contra*, *Mayor v. Mason*, 4 E. D. Smith, 142, 149.

³ *Rex v. Roberts*, 4 Mod., 101; 3 Salk., 198; *Com. v. Adams*, 4 Gray, 57; 10 Mod., 249; *contra*, 2 Hawks P. C. C., 25, § 82.

⁴ *Com. v. Stafford*, 12 Cush., 619.

⁵ *Rex v. Stead*, 8 T. R., 142; see R. S., 386, § 222.

⁶ *Chitty Cr. L.*, 240; 1 *Bish. Cr. P.*, § 502.

⁷ R. S., 408; § 411; *State v. Duncan*, 6 Ired., 236; *Taylor v. State*, 6 *Humph.*, 285; *State v. Elliott*, 7 *Blackf.*, 280; *State v. Temple*, 3 *Fairf.*, 214.

⁸ 1 *Chitty Cr. L.*, 240; 1 *Bish. Cr. P.*, § 501.

⁹ 1 *Chitty Cr. L.*, 245; 1 *Bish. Cr. P.*, § 647.

tion.¹ Each separate statement is called a count and will not be sufficient unless it states independent of the other counts facts sufficient to constitute a full and complete offense.² Different felonies or misdemeanors committed at different times, of the same nature, may be separately stated in several counts of an indictment, and no objection can be made to the indictment on that account in point of law.³ The judge may, however, in his discretion in cases of felony, require the counsel for the prosecution to select one of the felonies and confine himself to that. This is what is technically termed putting the prosecutor to his election.⁴

§ 800. Joinder of Offenses in Cases of Felony—Election.—In cases of felony no more than one distinct offense or criminal transaction at one time should regularly be charged upon the prisoner in one indictment,⁵ and where several distinct felonies, of the same degree, committed at different times, are joined in the same indictment against the same offender if the court perceives that by this means the prisoner will be confounded in his defense, or prejudiced in his challenges, or that the attention of the jury will be distracted, it will compel the prosecutor to elect on which count he will proceed.⁶ But this rule only applies where the charges are actually

¹ *Curtis v. People*, Breese, 200; 2d Ed., 260; *Townsend v. People*, 3 Scam., 326; *U. S. v. La Coste*, 2 Mason, 139; *State v. Williams*, 2 McCord, 301; *Com. v. Sylvester*, 6 P. L. J., 283; *State v. Thompson*, 2 Strob., 12; *Kane v. People*, 8 Wen., 203; *Miller v. People*, 25 Wis., 384; *McGregg v. State*, 4 Blackf., 101; *Newman v. State*, 14 Wis., 394; *Miller v. State*, 25 Wis., 384; *U. S. v. Pirates*, 5 Wheat., 201; *Wright v. State*, 1 Humph., 194; *Hildebrand v. State*, 5 Mo., 548; *Cash v. State*, 10 Humph., 111.

² *Baker v. State*, 4 Ark., 56; *State v. Longley*, 10 Ind., 484; *State v. Lyon*, 17 Wis., 237.

³ 1 Arch. C. P. & Pl., 310; *People v. Rynders*, 12 Wen., 425.

⁴ 1 Arch. C. P. & Pl., 310, 311; *Com. v. Symonds*, 2 Mass., 163.

⁵ 1 Arch. C. P. & Pl., 311; *Lazier v. Com.*, 10 Grat., 708; *Ketchingham v. State*, 6 Wis., 428; *Young v. Rex*, 3 T. R., 98; *Com. v. Manson*, 2 Ashm., 31; *State v. Abrahams*, 6 Iowa, 117.

⁶ *State v. Hogan*, R. M. Charlton, 474; *Young v. Rex*, 3 T. R., 98; *Com. v. Manson*, 2 Ashm., 31; *Lazier v. Com.*, 10 Grat., 708; *Rex v. Austin*, 7 Car. & P., 796; *Rex v. Hartall*, 7 Car. & P., 475; *Dowdy v. Com.*, 9 Grat., 727; *State v. Jackson*, 17 Mo., 544; *State v. McPherson*, 9 Iowa, 53.

distinct.¹ It is entirely in the discretion of the judge whether he will compel the prosecutor to select one of the felonies and confine himself to that or not.² Where the indictment contains several counts charging the same offense in different forms, the prosecution will not be compelled to elect on which count they ask a conviction.³ Even a count for a felony may be joined with a count for misdemeanor if each offense is a part of the same transaction.⁴ Where in a count for a greater offense every fact necessary to constitute the lesser offense is alleged, together with the additional facts which constitute the higher offense, a conviction may be had for the lesser offense.⁵

§ 801. Joinder of Offenses in Cases of Misdemeanor — Election. — In cases of a misdemeanor the prosecutor may join as many

¹ *Kane v. People*, 8 Wen., 203; *State v. Smith*, 8 Blackf., 489; *Wish v. State*, 14 Sm. & M., 120; *Com. v. McLaughlin*, 12 Cush., 614; *State v. Hazard*, 2 R. L., 474; *Sarah v. State*, 28 Missis., 276; *Donnelly v. State*, 2 Dutch., 601; *Com. v. Hope*, 22 Pick., 1; *Miller v. State*, 25 Wis., 384; *State v. Nichols*, 38 Iowa, 110; *State v. Sutton*, 4 Gill, 496; *People v. Austin*, 1 Park. Cr. R., 154; *State v. Canterbury*, 8 Fost. N. H., 195; *Wright v. State*, 4 Humph., 194.

² 1 Chitty Cr. L., 253; *People v. Baker*, 3 Hill, 159; *State v. Leonard*, 22 Mo., 449; *Bailey v. State*, 4 Ohio S., 440; *Johnson v. State*, 29 Ala., 62; *Weinzorplin v. State*, 7 Blackf., 186; *Nelson v. People*, 23 N. Y., 293; *Com. v. Sullivan*, 104 Mass., 552; *Com. v. Davenport*, 2 Allen, 299; *State v. Hood*, 51 Me., 363; *Ketchingham v. State*, 6 Wis., 426; *State v. Fee*, 19 Wis., 562; *State v. Gummer*, 22 Wis., 443.

³ *People v. Austin*, 1 Park. Cr. R., 154; *State v. Canterbury*, 8 Foster, 195; *State v. McPherson*, 9 Iowa, 53; *McGregg v. State*, 4 Blackf., 101; *Baker v. State*, 4 Pike, 56; *Kane v. People*, *v. Wen.*, 203; *People v. Rynders*, 12 Wen., 425; *May v. State*, 30 Ala., 34; *State v. Flye*, 26 Me., 312; *State v. Davis*, 29 Mo., 221; *Bailey v. State*, 4 Ohio S. 449; *State v. McPherson*, 9 Iowa, 53; *Miller v. State*, 25 Wis., 384; *State v. Abrahams*, 6 Iowa, 117.

⁴ *Com. v. McLaughlin*, 12 Cush., 614; *State v. Sutton*, 4 Gill, 495; *Burk v. State*, 2 Harring. & J., 426; *State v. Posey*, 7 Rich., 484; *Curtis v. People*, Breese, 200, 2d Ed., 256; *Rex v. Jones*, 8 Car. & P., 776; *U. S. v. Stetson*, 3 Woodb. & M., 164.

⁵ 1 Arch. C. P. & Pl., 309; *State v. Felner*, 19 Wis., 561; *Goodwin v. State*, 3 Iowa, 410; *Prinderville v. People*, 42 Ills., 217; *Carpenter v. People*, 4 Scam., 198; *Brennan v. People*, 15 Ills., 517; *Beckwith v. People*, 26 Ills., 500; *Dixon v. State*, 3 Iowa, 416; *State v. Shepard*, 10 Iowa, 126.

distinct offenses, growing out of the same¹ or out of separate and distinct² transactions in the same indictment as he chooses, provided each offense is stated in a separate count.³ And some of the authorities go so far as to hold that there is no power in the court to compel an election,⁴ but there is little doubt that where there are so many counts as to embarrass the defense, or where they are of a nature not to be properly joined, the election may be compelled;⁵ though in the cases of a misdemeanor the court will seldom exercise its discretion to compel the prosecutor to elect on which count he will proceed.⁶

§ 802. Cases in which an Election will not be Compelled. — The court will not compel the prosecutor to elect on which count he will proceed, where the indictment contains a count for rape, and another for an assault with intent to commit a rape;⁷ or where the indictment contains a count for a burglarious entry with intent to steal the goods of A, and stealing them, and a count for a burglarious entry with intent to steal the goods of another person, and a third count for breaking with intent to kill and murder;⁸ or where the indictment contains a count for receiving stolen goods, and another for bur-

¹ *People v. Gales*, 13 Wen., 322; *State v. Cooster*, 10 Iowa, 453; *State v. Bitting*, 13 Iowa, 600.

² *State v. Gummer*, 22 Wis., 441; *Byrne v. State*, 12 Wis., 519; *State v. Bielby*, 21 Wis., 204; *State v. Bitting*, 13 Iowa, 600.

³ *Reed v. People*, 1 Park. Cr. R., 481; *People v. Wright*, 9 Wen., 193; *Walters v. State*, 5 Iowa, 507; but see *State v. Abrahams*, 6 Iowa, 117.

⁴ *Com. v. Manson*, 2 Ashm., 31; *State v. March*, 1 Jones N. C., 526; *State v. Kibby*, 7 Mo., 317; *People v. Costello*, 1 Denio, 83; *Rex v. Jones*, 2 Campb., 131.

⁵ 1 Bish. Cr. P., § 458; *State v. Nelson*, 29 Me., 329; *Cheek v. State*, 1 Ala., Sel. Cas., 107, 116; *Rex v. Murphy*, 8 Car. & P., 276; *People v. Costello*, 1 Denio, 83; *Thompson v. State*, 17 Ga., 356.

⁶ 1 Arch. C. P. & Pl., 311, 312; *Young v. Rex T. R.*, 98; *R. v. Jones*, 2 Campb., 132; *Rex v. Saund.*, 2 Burr, 984; *Rex v. Kingston*, 8 East, 41; *U. S. v. Porter*, 2 Cranch C. C., 60; *Com. v. Manson*, 2 Ashm., 31.

⁷ *Stephen v. State*, 11 Ga., 224; *Buck v. State*, 2 Harring. & J., 426; *Harman v. Com.*, 12 Serg. & R., 64.

⁸ *Baker v. State*, 4 Ark., 56; *Com. v. Tuck*, 20 Pick., 356; *U. S. v. O'Callahan*, 6 McLean, 596.

glary, and a third for larceny;¹ or where the indictment contains a count for embezzlement and a count for larceny;² or where the indictment contains a count for counterfeiting coin and a count for having counterfeit coin with intent to pass the same;³ or where the indictment contains a count for uttering a forged instrument as true and a count for forgery;⁴ or where the indictment contains a count for being an accessory before the fact and a count for the same after the fact.⁵

§ 803. **Objection for the Misjoinder of Counts, how Taken — Verdict and Judgment, where Different Offenses are Charged.** — An indictment charging the defendant with distinct offenses, whether felonies⁶ or misdemeanors,⁷ or felonies and misdemeanors,⁸ of the same kind in different counts is good after verdict, and will sustain the conviction, even though the judgments on the several counts be different, if stated in separate counts,⁹ for the only remedy for the misjoinder of counts is by motion to compel the prosecutor to elect on what count he will pro-

¹ *People v. Baker*, 3 Hill, 159; *Rex v. Flower*, 3 Car. & P., 412; *Maynard v. State*, 14 Ind., 427; *State v. Stimpson*, 45 Me., 608; *Hampton v. State*, 8 Humph., 69; *Com. v. Adams*, 7 Gray, 43; but see *Rex v. Madden*, 1 Moody, 277; *Rex v. Galloway*, 1 Moody, 234; *Keeper v. State*, 4 Ind., 246.

² *Rex v. Johnson*, 3 M. & S., 539; *Coats v. People*, 4 Park. Cr. R., 662; *State v. Porter*, 26 Mo., 201.

³ *State v. McPherson*, 9 Iowa, 53.

⁴ *People v. Rynders*, 12 Wen., 426; *Hoskins v. State*, 11 Ga., 92; *Baker v. State*, 4 Pike Ark., 56; *Edge v. Com.*, 7 Barr, 275; *Engleman v. State*, 2 Carter Ind., 91; *State v. Nichols*, 38 Iowa, 110.

⁵ *Rex v. Blackson*, 8 Car. & P., 43; *U. S. v. Dickson*, 2 McLean, 325.

⁶ *Ketchingham v. State*, 6 Wis., 426; *Cash v. State*, 10 Humph., 111.

⁷ *Rex v. Galloway*, 1 Moody, 234; *Rex v. Benfield*, 2 Burr, 984; *Com. v. Gillespie*, 7 Serg. & R., 477; 3 M. & S., 550; *contra*, *Rex v. Clendon*, 2 Ld. Raym., 1572.

⁸ *U. S. v. Stetson*, 3 Woodb. & M., 164; *Reg. v. Jones*, 8 Car. & P., 776; *Buck v. State*, 2 Harring. & J., 426; *State v. Boise*, 1 McMillan, 181; *State v. Coleman*, 5 Porter, 52; *State v. Montague*, 2 McCord, 287; *contra*, *Hildebrand v. State*, 5 Mo., 548.

⁹ *Rex v. Galloway*, 1 Moody, 234; *Rex v. Powell*, 2 Barn. & Ald., 75; *Rex v. Strange*, 8 Car. & P., 172; *Baker v. State*, 4 Pike, 56; *Johnson v. State*, 29 Ala., 62; *People v. Rynders*, 12 Wen., 426; *contra*, *U. S. v. Sharp*, 1 Peters C. C., 118; see *State v. Coleman*, 5 Port., 32; *People v. Wright*, 9 Wen., 193.

ceed,¹ or to quash the indictment before trial.² Advantage cannot be taken of the objection by demurrer, motion in arrest of judgment³ or on error.⁴ But if the punishment differs for the different felonies charged, according to some of the authorities, the jury must state under which count they convict.⁵ Yet it has been held that after a general verdict of guilty the court might if any one or more counts were sufficient, render judgment upon such count or counts,⁶ and if all the counts were sufficient, judgment might be rendered upon the count charging the highest offense.⁷ Not only may a verdict of guilty be rendered on one count and not guilty upon another, but if the jury find the defendant guilty on one count and say nothing in their verdict concerning the other counts, it will be equivalent to a verdict of not guilty on such counts.⁸

§ 804. *Effect of Alleging Offenses to have been Committed in Different Counties.* — Where one count in a bill of indictment

¹ *State v. Woodard*, 21 Mo., 265; *Com. v. State*, 11 Gray, 60; *Josephine v. State*, 39 Missis., 613; *Rex v. Gough*, 1 Moody R., 71; *Byrne v. State*, 12 Wis., 519; *State v. Bielby*, 21 Wis., 204; *State v. Fee*, 19 Wis., 591.

² 1 Bish. Cr. L., § 455; *State v. Coleman*, 5 Port., 32; *Wash. v. State*, 14 Sm. & M., 120; *Mayo v. State*, 30 Ala., 32; *State v. Smith*, 8 Blackf., 489.

³ 1 Chitty Cr. L., 253; 2 Leach, 1105; *State v. Coleman*, 5 Port., 32; *Calton v. Com.*, 5 Met., 532; *Stone v. State*, 1 Spencer, 404; *Rex v. Ferguson*, 29 Eng. L. & Eq., 536; *State v. Nelson*, 14 Rich., 169; *State v. Brown*, 1 Winston, No. 2, 54; *Rex v. Kingston*, 8 East, 41, 46; *contra*, 1 Chitty Cr. L., 254; *State v. Faust*, 2 Brev., 487; *State v. Cherry*, 1 Swan Tenn., 160.

⁴ 1 Bish. Cr. P., § 454; *State v. Fee*, 19 Wis., 591; *Young v. Rex*, 3 T. R., 98; *Cowley v. Com.*, 11 Met., 575; *Kite v. Com.*, 11 Met., 581; *contra*, *Wilson v. State*, 20 Ohio, 26; 1 Whart. Cr. L., 418, 419.

⁵ *Carter v. State*, 20 Wis., 647; *Ketchingham v. State*, 20 Wis., 647; *State v. Montague*, 2 McCord, 258; *State v. Anderson*, 1 Strob., 455; *State v. Puester*, 1 Cheves, 103; *contra*, *Scott v. State*, 31 Missis., 473.

⁶ 1 Arch. C. P. & Pl., 303, 312; *U. S. v. Stetson*, 3 W. & M., 164; *Curtis v. People*, Breese, 200, 2d Ed., § 256; *Townsend v. People*, 3 Scam., 329; *Holliday v. People*, 4 Gilm., 113; *U. S. v. Pirates*, 5 Wheat., 184; *Com. v. Gable*, 2 Serg. & R., 423; *U. S. v. Sharp*, 1 Peters C. C., 133.

⁷ *State v. Hooker*, 17 Vt., 658; *Cook v. State*, 4 Zab. N. J., 843; *Manley v. State*, 7 Md., 135.

⁸ *Stultz v. People*, 4 Scam., 168; *Chambers v. People*, 4 Scam., 351; *Weinzorpfli v. State*, 7 Blackf., 186; *Morris v. State*, 8 Sm. & M., 762; *Com. v. Bennet*, 2 Va. Cases, 235; *Kirk v. Com.*, 9 Leigh, 627; *State v. Phinney*, 42 Me., 384; *Rex v. Cradock*, 1 Eng. R., 569.

charges the offense to have been committed in one county and another count charges it in another, on motion the prosecutor will be compelled to elect which count he will proceed, on, or the court may quash the count, alleging the offense to have been committed out of the county.¹

§ 805. **Duplicity.** — A count is bad for duplicity which charges two distinct offenses,² especially if one offense requires a different punishment from the other.³ But since one offense may include several others, a count which only charges all the facts necessary to constitute a single offense, is not double though it charges in the proper form facts sufficient to constitute several lesser offenses.⁴ Therefore a count which charges the offense of murder is not double, because it contains a full and technical charge of manslaughter, and also the offense of an assault and battery.⁵ So a count for false imprisonment or rape is not double, because its allegations sufficiently charge an assault and battery.⁶ A count, charging that the defendant broke and entered into a shop with intent to commit a larceny, and did then and there commit a larceny, is not bad for duplicity.⁷ The same count may join the larceny of several distinct articles belonging to different owners where the time and place of taking each are the same.⁸ So the same count may include the battery of two or more

¹ *State v. Jones*, N. C., 221.

² *State v. Howe*, 1 Rich., 260; *Reed v. People*, 1 Park. Cr. R., 481; U. S. v. Sharp, 1 Peters C. C., 131; *State v. Bridges*, 24 Mo., 353; *Com. v. Symonds*, 2 Mass., 163; *State v. Nelson*, 8 N. H., 163; *Com. v. Gable*, 7 Serg. & R., 423; *Long v. State*, 12 Ga., 293; *Greenlow v. State*, 4 Humph., 26; *State v. King*, 37 Iowa, 462.

³ *Reed v. People*, 1 Park. Cr. R., 481; *People v. Wright*, 9 Wen., 196; *State v. Nelson*, 8 N. H., 163; *State v. McPherson*, 9 Iowa, 53.

⁴ *Com. v. Honey*, 10 Met., 422, 425; *McKenney v. State*, 25 Wis., 378; *Cockley v. State*, 4 Iowa, 477; *State v. Twogood*, 7 Iowa, 252.

⁵ *Com. v. Honey*, 10 Met., 422, 425.

⁶ *Francisco v. State*, 4 Zab. N. J., 30; *Com. v. Dean*, 109 Mass., 349.

⁷ *Com. v. Tuck*, 20 Pick., 356; *State v. Brady*, 14 Vt., 353; *State v. Colter*, 6 R. I., 195; *Breese v. State*, 12 Ohio S., 146; *Davis v. State*, 3 Cold., 77; *State v. Ayer*, 3 Foster N. H., 355; *State v. Crocker*, 3 Harring., 554; *State v. Gusham*, 1 Hayes, 12.

⁸ *Com. v. Williams*, *Thatch. C. C.*, 722.

persons,¹ or a libel upon two or more persons.² So a count in an indictment charging a man with an endeavor to procure the commission of two offenses is not bad for duplicity, because the endeavor is the offense charged.³ If an indictment describes one offense and then adds such words only as are in part sufficient to describe another, it is not therefore double.⁴ To be so it must set out each of the two offenses in adequate terms.⁵ Where an indictment for selling intoxicating liquors charged that the defendant did keep and was concerned, engaged and employed in owning and keeping intoxicating liquors to sell, it was held that the indictment described but a single offense.⁶

§ 806. Continued.—Changing “or” in the Statute into “and” in an Indictment.—Where a statute makes it a crime to do any one of several things mentioned disjunctively, all of which are punished alike, it is a general rule that the whole may be charged conjunctively, that is, by substituting the word “and” for “or” in the statute in a single count as a single offense, without making the count bad for duplicity.⁷ Offenses may be alleged cumulatively both at common law and under the statutes; as that the defendant published *and* caused to be published a certain libel that he forged, *and* caused to be forged,⁸ etc., but only one connected charge or one transaction

¹ Reg. v. Giddens, C. & M., 634; Com. v. McLaughlin, 12 Cush., 615; Rex v. Benfield, 2 Bur., 984; Com. v. O'Brien, 107 Mass., 208; *contra*, 2 Stra., 890; 2 Ld. Raym., 1572.

² Rex v. Jenner, 7 Mod., 400; 2 Bur., 983.

³ Rex v. Fuller, 1 B. & P., 180.

⁴ Jellard v. Com., 2 Casey, 169; State v. Palmer, 35 Me., 9.

⁵ Com. v. Tuck, 20 Pick., 360; Dawson v. People, 25 N. Y., 399; Burchard v. State, 2 Oregon, 78.

⁶ Vaughn v. State, 5 Iowa, 269.

⁷ Clifford v. State, 29 Wis., 327; State v. Bielby, 21 Wis., 204; State v. Kuns, 5 Blackf., 314; Com. v. Eaton, 15 Pick., 275; State v. Harris, 11 Iowa, 414; State v. Whitted, 3 Ala., 102; Reg. v. Bourne, 1 Den. C. C., 22; State v. Nelson, 29 Me., 329; Byrne v. State, 12 Wis., 519; State v. Myers, 10 Iowa, 448; State v. Cooster, 10 Iowa, 454; State v. Hockenberry, 11 Iowa, 269; State v. Becker, 20 Iowa, 438; State v. Baughman, 20 Iowa, 497.

⁸ 1 Bish. Cr. P., § 435; Rex v. Fuller, 2 Leach, 790; State v. Kuns, 5 Blackf., 314; Ben v. State, 22 Ala., 9; State v. Houseall, 2 Rice's Dig., 346.

can be stated in a single count without making it bad for duplicity.¹

§ 807. **How Defendant to take Advantage of Duplicity.**—Exception for duplicity where the punishment for each offense is the same goes merely to the form of the count or indictment,² and therefore must be made before trial,³ by motion to quash the count, by special demurrer or possibly by a general demurrer,⁴ for advantage cannot be taken of such defect by motion in arrest of judgment nor by writ of error.⁵ If, however, two offenses requiring different punishments are charged in the same count, advantage may be taken of such duplicity by motion in arrest of judgment or on error.⁶ Yet if there is a verdict convicting the defendant of one of the offenses charged and acquitting him of the other, the defect is thereby cured.⁷ So the defect is cured by a *nol pros.* entered as to one of the offenses by the prosecuting officer before trial.⁸

§ 808. **Repugnancy.**—The charge contained in each count must not be repugnant or inconsistent with itself, for the law will not admit of absurdity and contradiction in legal proceedings.⁹ Therefore a count which alleged that the defendant on the 23d and 29th days of July, 1852, did sell a quantity of spirituous liquors, is bad for repugnancy, for if he sold the same liquor on the 23d he could not have sold it on the 29th, though he might have sold other liquor on that day.¹⁰ In theory each count is supposed to contain a statement of a

¹ Barnes v. State, 20 Conn., 232; Francisco v. State, 4 Zab., 32.

² 1 Bish. Cr. P., § 443.

³ R. S., 408, § 411; State v. Brown, 8 Humph., 89; Shaffer v. State, 26 Ind., 191; Com. v. Tuck, 20 Pick., 361; Com. v. Wolcott, 110 Mass., 67.

⁴ 1 Bish. Cr. P., § 442; Simons v. State, 25 Ind., 331.

⁵ State v. Johnson, 3 Hill S. C., 1; People v. Shotwell, 27 Cal., 394.

⁶ Reed v. People, 1 Park. Cr. R., 481; People v. Wright, 9 Wen., 196; State v. Merrill, 44 N. H., 624; State v. Howe, 1 Rich., 260; Com. v. Symonds, 2 Mass., 163.

⁷ State v. Miller, 24 Conn., 522; State v. Merrill, 44 N. H., 624.

⁸ State v. Merrill, 44 N. H., 624.

⁹ 1 Chitty Cr. L., 231; State v. Copp, 15 N. H., 212; State v. Hand, 1 Engl., 165.

¹⁰ Com. v. Adams, 1 Gray, 481; State v. Temple, 38 Vt., 37.

separate and distinct offense;¹ therefore if the allegations of one count contradict and are repugnant to the allegations of another, this does not make the indictment bad for repugnancy;² where the contradictory or repugnant expressions do not enter into the substance of the offense,³ or where they are inconsistent with any preceding averment, and the indictment will be good without them,⁴ they may be rejected as surplusage.⁵ But where the material allegations in a count are inconsistent, conflicting or contradictory, the count is bad for repugnancy.⁶ A relative pronoun referring with equal certainty to two antecedents will make the count bad.⁷

§ 809. *Surplusage*.—Unnecessary words will not vitiate a count in an indictment if the count would be good upon striking them out,⁸ unless these words show affirmatively that no crime has in fact been committed.⁹ If, however, descriptive words are used, though unnecessarily, they must be proved. As, for instance, if a person be charged with obstructing a county road¹⁰ or with stealing a black horse, the allegation of color or kind of road is unnecessary; yet as it is descriptive of that which is the subject matter of the charge, it cannot be rejected as surplusage, and the man convicted of stealing a white horse,¹¹ or of obstructing a highway which is not a county

¹ 1 Bish. Cr. P., § 427.

² *U. S. v. Pirates*, 5 Wheat., 201; *Mills v. Com.*, 1 Harris, 634; *Miller v. State*, 25 Wis., 384.

³ 5 East, 254.

⁴ *Gilb. Cr. P.*, 131; *Co Lit.*, 303*b*, 3 East, 142.

⁵ 1 Bish. Cr. P., § 491.

⁶ 1 Arch. C. P. & Pl., 299; 5 East, 254, 255; 3 Mod., 104; 2 Show, 460; *Mills v. Com.*, 1 Harris, 634; *State v. Hendricks*, Conference R., 369; *Serpentine v. State*, 1 How. Missis., 260.

⁷ 1 Whart. Cr. L., § 396.

⁸ *Id.*, § 622; 1 Bish. Cr. P., § 478; *People v. White*, 22 Wen., 167; *People v. Lohman*, 2 Barb., 216; *State v. Carrigan*, 24 Conn., 296; *State v. Elliott*, 14 Texas, 423; *State v. Palmer*, 35 Me., 9; *State v. Bailey*, 11 Foster N. H., 521; *Dunham v. People*, 4 Scam., 172; *Flint v. People*, 45 Ills., 259.

⁹ 1 Bish. Cr. P., § 482.

¹⁰ *State v. Snyder*, 25 Iowa, 208.

¹¹ 1 Arch. C. P. & Pl., 297; *U. S. v. Keene*, 1 McLean, 441; *State v. Noble*,

road. A draft signed Jos. Johnson was not admitted in evidence under a count stating it to have been signed "Joseph Johnson, President."¹ An indictment for receiving stolen goods, knowing them to be stolen, need not state by whom the larceny of them was committed; yet if it does, the evidence must correspond with the allegation.² Where in an indictment for arson the house burned was described as being located in the sixth ward, while the proof showed it to be in the fifth ward, the variance was held fatal.³ In an indictment for libel it is sufficient to allege that the libel was published on a particular day, and proof of the publication on the same or any other day will support the charge; yet if it add the date of the newspaper containing it, this date, though it need not have been mentioned, must be proved.⁴ Proof of cutting black-oak trees will not support an indictment for malicious mischief done to white-oak trees;⁵ neither will proof of forging a note under seal support a charge of forging one not under seal.⁶ And where a statute made it an offense to be a common seller of spirituous or intoxicating liquors without license, and the defendant was charged with being such common seller "of spirituous and intoxicating liquors," it was held that though the proof of the liquor being either spirituous or intoxicating would satisfy the demands of the statute, yet to meet the allegation it must be shown to be both.⁷

§810. **Exceptions in a Statute.** — If there be any exception in the same clause of the act which creates the offense, the in-

15 Me., 476; *State v. Jackson*, 30 Me., 29; *U. S. v. Brown*, 3 McLean, 233; *U. S. v. Howard*, 3 Sumner, 12; *Dick v. State*, 30 Missis., 631.

¹ *U. S. v. Keene*, 1 McLean, 441.

² *Com. v. King*, 9 Cush., 284; *Rex v. Woolford*, 1 Moody & R., 384; see also *State v. Johnson*, 6 Jones N. C., 485; *State v. Weeks*, 30 Me., 182; *John v. State*, 24 Missis., 569.

³ *People v. Slater*, 5 Hill N. Y., 401; *State v. Crogan*, 8 Iowa, 523.

⁴ *Com. v. Varney*, 10 Cush., 402.

⁵ *Com. v. Butcher*, 4 Grat., 544.

⁶ *Hart v. State*, 20 Ohio, 49.

⁷ *Com. v. Livermore*, 4 Gray, 18; see also *Jackson v. State*, 4 Ind., 560; *Isley v. State*, 8 Blackf., 403.

dictment must show affirmatively¹ that the defendant does not come within the exception; but if the exception or proviso be in a subsequent clause or statute, or if in the same section, and not connected with the enacting clause by any words of reference, it is in that case matter of defense and need not be negatived in the pleading.²

§ 811. **Indorsement.** — The statute makes it the duty of the foreman of the grand jury, when the grand jury or any twelve of them find a bill of indictment, to indorse thereon "A true bill;" when they do not find a bill to be supported by good and sufficient evidence, to indorse thereon, "Not a true bill;" and in either case, to sign his name as foreman at the foot of said indorsement, and also in each case in which a true bill is returned into court to note thereon the name or names of the witness or witnesses upon whose evidence the same shall have been found.³ The indorsement and signature of the foreman are the evidence of the finding of the jury; without the indorsement of the words "A true bill" on an indictment signed by the foreman, the indictment is a nullity,⁴ and the court should never permit it to be entered of record as a true bill, but the name of the foreman need not be copied into the record.⁵ Where the indorsement on an indictment is signed by "A. B., Foreman," while the record shows that C. D. was appointed foreman of the grand jury, the Supreme Court will intend that C. D. was discharged and that A. B. was appointed in his place.⁶ It is no ground for quashing the indictment

¹ *Lequat v. People*, 11 Ills., 331; *Metzker v. People*, 14 Ills., 102; *State v. Munger*, 15 Vt., 290; *State v. Godfrey*, 11 Shep., 232.

² 1 Whart. Cr. L., 378; 1 Bish. Cr. P., §§ 631, 633; *Metzker v. People*, 14 Ills., 102; *Colson v. State*, 7 Blackf., 590; *Wooley v. State*, 11 Humph., 172; *State v. Miller*, 24 Conn., 522; *Romp v. State*, 3 Iowa, 415; *State v. Burke*, 9 Iowa, 204; *State v. Williams*, 20 Iowa, 98; *State v. Stapp*, 29 Iowa, 551; *State v. Curley*, 33 Iowa, 359.

³ R. S., 634, § 17.

⁴ *Nomaque v. People*, Breese, 109, 2d Ed., 145; *Gardiner v. People*, 3 Scam., 83; *Dutel v. State*, 4 Greene Iowa, 125; but see *Wau-kon-chaw-neek-kaw v. U. S.*, Morris Iowa, 332.

⁵ *Gardiner v. People*, 3 Scam., 83; *Morton v. People*, 47 Ills., 469

⁶ *Mohler v. People*, 24 Ills., 26; *State v. Groome*, 10 Iowa, 308.

that in the signature of the foreman of the grand jury the Christian name is represented by the initial letter only.¹

§ 812. *List of Witnesses.* — The prosecution is not confined to the list of witnesses indorsed on the indictment, and furnished previous to the arraignment, but the court in the exercise of sound discretion, and having a strict regard to the rights of the prisoner and of the community, may permit such other witnesses to be examined as the justice of the case may seem to require,² if the calling of such witnesses occasions no surprise to the accused.³ And to avoid surprise to the accused it is usual when the counsel for the prosecution is aware of the existence and necessity of the evidence before the commencement of the trial, to require him then to give the accused notice of his intention, to call the witnesses so that he may apply for a continuance on that account if necessary.⁴ In cases of a misdemeanor, where the names of some of the witnesses appear upon the back of the indictment, the court will presume that the accused was satisfied with the list furnished unless the record shows that he demanded a more complete list.⁵

§ 813. *Continued.* — If the witnesses' names on whose evidence the indictment was found are not noted thereon, the omission is an irregularity which may be corrected by a motion to quash the indictment. If the motion is refused, the fact may be preserved by a bill of exceptions. Such irregularity is waived by the prisoner's pleading without objection.⁶

¹ *Com. v. Gleason*, 110 Mass., 66.

² *State v. McClintock*, 8 Iowa, 205; *State v. Pierce*, 8 Iowa, 232; *State v. Abrahams*, 6 Iowa, 117; *State v. Gillick*, 10 Iowa, 98; *State v. Bowers*, 17 Iowa, 46; *State v. McComb*, 18 Iowa, 43; *State v. Ostrander*, 18 Iowa, 437; *Gardiner v. People*, 3 Scam., 89; *Gates v. People*, 14 Ills., 436; *State v. Schlager*, 19 Iowa, 169; *State v. McCoy*, 20 Iowa, 262; *State v. Stanley*, 33 Iowa, 532; *contra*, *Smith v. State*, 4 Greene Iowa, 189; *Hariman v. State*, 2 Greene Iowa, 272.

³ *Perry v. People*, 14 Ills., 497.

⁴ *Gardiner v. People*, 3 Scam., 89; *Gates v. People*, 14 Ills., 435.

⁵ *Morton v. People*, 47 Ills., 468.

⁶ *McKinney v. People*, 2 Gilm., 552; *Harriman v. State*, 2 Greene Iowa, 271; and see *Vezain v. People*, 40 Ills., 397; *Winship v. People*, 51 Ills., 296.

And it is not necessary that the names of the witnesses should be copied into the record,¹ but the court will presume on error that the names of the witnesses were properly indorsed on the indictment unless it appears affirmatively by the bill of exceptions that the objection was taken at the proper time.² It is not necessary that the names of the witnesses should be indorsed on the back of the indictment. If the names of the witnesses are noted on the indictment anywhere it is sufficient, as where they were noted at the foot of the indictment under the name of the state's attorney.³

§ 814. **Prosecutor Indorsed — Malicious Prosecution.** — The statute provides that "No bill of indictment for false imprisonment, or willful and malicious mischief, shall be found a "true bill" by any grand jury, unless a prosecutor is indorsed thereon⁴ by the foreman of the grand jury with the consent of the prosecutor, except the same shall be found upon the information and knowledge of two or more of the grand jury, or upon the information of some public officer in the necessary discharge of his duty, in which case it shall be stated at the end of the indictment how the same is found, and then no prosecutor shall be required; but in cases where a prosecutor is indorsed on the indictment, and the defendant shall be acquitted on the trial, the petit jury acquitting such defendant shall, in addition to the verdict of not guilty, state whether the prosecutor had acted maliciously by instituting the prosecution or not; and whenever the petit jury shall return with a verdict not guilty, that the prosecutor had acted maliciously in the premises, the court shall enter judgment for costs against the prosecutor, including a fee of five

¹ *Gardiner v. People*, 3 Scam., 85; *McKinney v. People*, 2 Gilm., 552; *Morton v. People*, 47 Ills., 468.

² *McKinney v. People*, 2 Gilm., 552; *Ray v. State*, 1 Greene Iowa, 316; *Morton v. People*, 47 Ills., 468.

³ *Williams v. State*, 9 Mo., 270; *Scott v. People*, 63 Ills., 508.

⁴ The objection that the name of the prosecutor was not indorsed on an indictment must be made before pleading to the indictment by a motion to quash. It comes too late on error. *Verzain v. People*, 40 Ills., 397; *Winship v. People*, 51 Ills., 296.

dollars to the attorney general or states attorney, and award execution for the same, as is done in civil cases: *Provided*, that nothing herein contained shall render the prosecutor incompetent to be a witness, either before a grand or petit jury.”¹

§ 815. **Indictment to be Returned into Open Court.**— Before a party can be tried on an indictment the record must show that it was returned into open court.² Where the record fails to disclose such fact a motion in arrest of judgment will be sustained.³ But where the record recited, “Be it remembered that on the 18th day of March, 1868, the following indictment was filed, *to wit.*,” and then gave a true copy of the indictment indorsed “A true bill,” with the names of the witnesses, it was held sufficient.⁴

§ 816. **Joinder of Offenders.**— All who aid, abet or assist,⁵ or, not being present, encourage, aid or abet⁶ in the commission of a crime are jointly and severally liable therefor. Each may be indicted separately from the others,⁷ or they may all, or any number of them, be indicted jointly, not in separate counts, but in a single count.⁸ Where two or more persons conspire to commit a felony,⁹ or combine, or form a joint de-

¹ R. S., 408, § 409.

² *Gardiner v. People*, 3 Scam., 83, 20 Ills., 430; *Kelley v. People*, 39 Ills., 157; *Ramey v. People*, 3 Gilm., 71; *Sattler v. People*, 59 Ills., 68; *Gahan v. People*, 58 Ills., 160; *Aylesworth v. People*, 65 Ills., 301; *Yundt v. People*, 65 Ills., 373.

³ *Kelley v. People*, 39 Ills., 157; *Sattler v. People*, 59 Ills., 68; and see *Wrocklege v. State*, 1 Iowa, 167; *Herring v. State*, 1 Iowa, 206; but see *State v. Axt*, 6 Iowa, 511.

⁴ *Morton v. People*, 47 Ills., 468; *Gahan v. People*, 58 Ills., 160; *State v. Jolly*, 7 Iowa, 13; *State v. Shepard*, 10 Iowa, 126; see *Dixon v. State*, 4 Greene Iowa, 381.

⁵ *Rex v. Holland*, 5 T. R., 607; *Rex v. Kinnersley*, 1 Stra., 193; *Rex v. Sudbury*, 12 Mod., 262; *Com. v. McCord*, 2 Dana, 212; *Young v. Rex*, 3 T. R., 98; *Com. v. Elwell*, 2 Met., 190; *State v. Mainor*, 6 Ired., 340.

⁶ *Brennan v. People*, 15 Ills., 516; *Baxter v. People*, 3 Gilm., 368; *Dempsey v. People*, 47 Ills., 323; *Yoe v. People*, 49 Ills., 410; *Rex v. Barber*, 1 Car. & K., 442.

⁷ 1 Whart. Cr. L., § 429; *U. S. v. O’Callahan*, 6 McLean, 429.

⁸ *State v. Gay*, 10 Mo., 440; *State v. Bradley*, 9 Rich. S. C., 168.

⁹ *Miller v. State*, 25 Wis., 384.

sign to do an unlawful act,¹ each is liable for the act of the other done in the furtherance of the common purpose, and bound by the admissions and declarations of the others.²

§ 817. Continued—Trial—Conviction where a Lesser Offense is Included in a Greater.—While it requires two or more persons to commit the crime of conspiracy³ or riot,⁴ each offender may be indicted and tried separately. Offenders may be jointly indicted for selling intoxicating liquors without license,⁵ for the unlicensed keeping of a ferry,⁶ for extortion,⁷ and for assault and battery,⁸ even by a husband and wife.⁹ But several persons cannot be jointly indicted for the same perjury,¹⁰ nor as common scolds,¹¹ nor for the same barratry,¹² nor for the non-repair of the street before their houses,¹³ unless all but one of them are indicted as accessories¹⁴ for such offense can only be committed by one. And a misjoinder of this kind is fatal in arrest of judgment,¹⁵ and would be equally objectionable on demurrer.¹⁶ If A. and B. are jointly indicted and tried for

¹ *Solyman v. Bill*, 61 Ills., 167; *Brennan v. People*, 15 Ills., 511; *Rex v. Young*, 3 T. R., 98; *Miller v. People*, 39 Ills., 45; *Stinson v. People*, 43 Ills., 397.

² *Gardiner v. People*, 3 Scam., 90; *Ousley v. Harden*, 23 Ills., 404; *C. v. R. I. & P. R. R. Co. v. Collins*, 56 Ills., 212; *State v. Nash*, 7 Iowa, 348; *State v. Meyers*, 19 Iowa, 517.

³ R. S., 358, § 45, 46; *Rex v. Kinnersley*, 1 Stra., 193; *Rex v. Sudbury*, 12 Mod., 262.

⁴ R. S., 390, § 249; 1 Bish. Cr. P., § 464; Co. Lit., 431.

⁵ *Com. v. Sloan*, 4 Cush., 52.

⁶ *State v. Gay*, 10 Mo., 440.

⁷ *Reg. v. Atkinson*, 2 Ld. Raym., 1248, 11 Mod., 79; *Rex v. Atkinson*, 1 Salk., 382.

⁸ 1 Bish. Cr. P., 469; *Anon. Loft*, 271; *Rex v. Benfield*, 2 Bur., 980; *State v. Pile*, 5 Ala., 72; *White v. People*, 32 N. Y., 365.

⁹ *Com. v. Ray*, 1 Va. Cas., 262.

¹⁰ *Rex v. Philips*, 2 Stra., 921.

¹¹ 2 Stra., 921.

¹² Id.

¹³ 2 Hawks P. C. C., 252 § 89.

¹⁴ 1 Bish. Cr. P., § 470; *Elliott v. State*, 3 Sneed Tenn., 107

¹⁵ 2 Stra., 291.

¹⁶ 1 Stark. Cr. Pl., 2d Ed., 36; 1 Bish. Cr. P., § 470; *Young v. King*, 3 T. R., 103; *Rex v. Clark*, 1 East, 46, 2 Campb., 132.

gaming, and the evidence shows that A. and others played at one time when B. was not present, and B. and others played at another time when A. was not present, no conviction can be had against them.¹ Where two or more persons are indicted for an assault on two persons, they cannot be convicted of a joint offense, unless the jury find that the assault and battery was committed upon both the persons.² Where two or more are charged with a joint offense one may be found guilty and the other acquitted,³ or there may be a verdict and judgment or either against or in favor of any one of several defendants in advance of the rest.⁴ And where there are several lesser offenses included in a greater, one defendant may be convicted of the whole charge, another of a part of it, and another of another part.⁵

GENERAL FORM OF AN INDICTMENT.⁶

State of Illinois, } Of the⁷ — term of the⁸ — circuit court, in the
 ——— County. } ss. year of our Lord 18—.

The grand jurors chosen, selected and sworn⁹ in and for the said county of¹⁰ —, in the name and by the authority of the People of the State of Illi-

¹ Elliot v. State, 26 Ala., 78; Rex v. Hempstead, Russ. & Ry., 344.

² State v. McClintock, 8 Iowa, 203.

³ Rex v. Taggart, 1 Car. & P., 201; State v. McClintock, 1 Greene Iowa, 392.

⁴ Hall v. State, 8 Ind., 439; Cochran v. Amon, 16 Ills., 317.

⁵ 1 Bish. Cr. P., § 1037; Klein v. People, 31 N. Y., 229; White v. People, 32 N. Y., 465; Mask v. State, 32 Missis., 405; Rex v. Butterworth, Russ. & Ry., 520; Rex v. Turner, 1 Sid., 171; *contra*, 1 Whart. Cr. L., § 432; Rex v. Hempstead, Russ. & Ry., 344.

⁶ Form prescribed by the statute, R. S., 408; see notes to general form of a complaint for many of the requisites of an indictment, *ante* p. 35.

⁷ Insert the month on which the term commences.

⁸ Insert the name of the county in which the indictment is found.

⁹ The indictment must show that the jurors were sworn. Duncan v. People, 1 Scam., 456.

¹⁰ Formerly the criminal jurisdiction of the municipal court of the city of Chicago was confined to the territorial limits of the city. Therefore an indictment purporting to be found by the grand jurors, chosen and selected and sworn in and for the city of Chicago and county of Cook was held to be bad. Bell v. People, 1 Scam., 397; but the present criminal court of Cook county has jurisdiction in all criminal cases arising in Cook county. R. S., 72, Const. Ills., Art. VI., § 26.

nois¹ upon their oaths² present³ that C. D., on the — day of — in the the year of our Lord,⁴ one thousand eight hundred and —, at the town (*or* "city") of —, in⁵ said county (*here insert a statement of the offense⁶ and then add*), contrary to the form of the statute in such case made and provided,⁷ and against the peace and dignity of the same people of the state of Illinois⁸ (*if another count is to be added then say*). And the jurors aforesaid in the names and by the authority of the people of the state of Illinois

¹ An indictment must contain the words "In the name and by the authority of the People of the State of Illinois." R. S., 73, Const. Ills., Art. VI., § 33, 408, § 408; Hay v. People, 59 Ills., 94; Wright v. People, 15 Ills., 417; Donnolly v. People, 11 Ills., 552; Whitesides v. People, Breese, 4, 2d Ed., 21; but see Wrocklege v. State, 1 Iowa, 168. The mis-spelling of the name of the state is not a fatal defect. State v. Gurlock, 14 Iowa, 444.

² The omission of the word "oaths" is a matter of form only. Curtis v. People, Breese, 200, 2d Ed., 256; and see Byam v. State, 17 Wis., 145; therefore an exception therefor must be taken by a motion to quash the indictment before pleading. It cannot be made available on motion in arrest of judgment nor be assigned for error. R. S., 408, § 41. Curtis v. People, Breese, 200, 2d Ed., 256; Guykowski v. People, 1 Scam., 483; Stone v. People, 2 Scam., 333; Townsend v. People, 3 Scam., 329; Conolly v. People, 3 Scam., 477.

³ The caption ends with the words "upon their oaths present," all previous constitutes the caption. Duncan v. People, 1 Scam., 457; State v. Creight, 1 Brev., 169; Allen v. State, 5 Wis., 329. The facts narrated after this caption or commencement of the indictment is the count. Duncan v. People, 1 Scam., 457.

⁴ The year must be averred to be the year of our Lord. Whitesides v. People, Breese, 4, 2d Ed., 21.

⁵ If the allegation is that the offense was committed "at" instead of "in" the county, it is sufficient, 1 Bish. Cr. P., § 378; Augustine v. State, 20 Texas, 450; Curtis v. People, Breese, 197; 2d Ed., 257.

⁶ Each statement of the offense or count in an indictment must be sufficient in itself, and averments in one cannot aid defects in the other. Longley v. State, 10 Ind., 482. For forms of a statement of the different offenses, see the respective titles.

⁷ Each count must conclude "contrary to the statute," etc., if the indictment is on the statute. Reg. v. Purchase, C. & M., 614; State v. Soule, 20 Me., 19; and "against the peace," etc., State v. Cadle, 18 Ark., 613; Williams v. State, 27 Ills., 402.

⁸ The conclusion of an indictment in the words "against the peace and dignity of the people of the state of Illinois," was held to be a substantial compliance with the provision of the constitution, and therefore to be sufficient. Zarresseller v. People, 17 Ills., 104; Morton v. People, 47 Ills., 469; *contra*, 27 Wis., 402.

aforesaid, upon their oaths aforesaid, do further present¹ that C. D. on the day and year aforesaid, and in the county aforesaid, did (*here insert another statement² of the offense and then add*) contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the state of Illinois.

J. P.³ State's Attorney

FORM OF AN INDICTMENT CONTAINING A COUNT FOR AN ASSAULT WITH INTENT TO MURDER, AND A COUNT FOR AN ASSAULT AND BATTERY.⁴

State of Illinois, }
Clinton County. } ss. Of the April term of the Clinton Circuit Court, in the year of our Lord, one thousand eight hundred and twenty-eight.

The grand jurors chosen, selected, and sworn in and for the said county of Clinton, in the name and by authority of the People of the State of Illinois, upon their oaths present that Henry Curtis, on the tenth day of December, in the year of our Lord one thousand eight hundred and twenty-seven, at —, in said county, with a rifle gun then and there held in his hands and loaded with powder and one leaden ball, unlawfully, willfully, feloniously, of his malice aforethought, did assault James Tilton, then and there being in the peace of the said people, and discharge the said loaded gun against and upon him the said James Tilton, giving then and there to him one dangerous wound in his right leg, with intent in and upon him, the said James Tilton, then and there unlawfully, willfully and feloniously, and of his malice aforethought, to commit a murder,⁵ contrary to the form

¹ If the words "And the jurors aforesaid, in the name and by the authority of the people of the state of Illinois aforesaid, upon their oaths aforesaid, do further present" are omitted from the commencement of any count, such count for that reason will be bad. *State v. McAllister*, 26 Me., 374. Yet it has been held where the first count was quashed on a motion that the second count would be good by reference to the caption of the first count. *Duncan v. People*, 1 Scam, 457.

² Repetitions may be avoided by referring to a limited extent from one count to another, 1 Bish. Cr. P., 431.

³ It is usual and customary for the state's attorney to subscribe the indictment, but this is not legally essential to its validity, 1 Bish. Cr. P., § 702; *Thomas v. State*, 6 Mo., 457; *Com. v. Stone*, 105 Mass., 469.

⁴ For another form, see *Beckwith v. People*, 26 Ills., 500.

⁵ These words sufficiently describe the intent. *Curtis v. People*, Breese, 197, 2nd Ed., 257; *Nixon v. People*, 2 Scam., 268; *Beckwith v. People*, 26 Ills., 500; *Perry v. People*, 14 Ills., 499; *State v. Williams*, 3 Foster, 321; *State v. Nelson*, 7 Blackf., 610. Where the words used were "with intent to kill one James Tilton," the count was held insufficient, because the intent was not charged to be malicious, unlawful and felonious. *Curtis v. People*, Breese, 197, 2nd Ed., 257; but it has since been held that the omission of

of the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois.

And the jurors aforesaid in the name and by the authority of the People of the State of Illinois' aforesaid, upon their oaths aforesaid, do further present that on the day and year aforesaid, in the county aforesaid, Henry Curtis, did with force and arms make an assault upon the body of James Tilton, the said James Tilton then and there being in the peace of God and the said people, and him the said James Tilton, then and there did beat, bruise and ill-treat, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

J. P., State's Attorney.

INDICTMENT FOR AN ASSAULT WITH INTENT TO MURDER.²

State of Illinois,	} ss.	Of the April term of the Wayne Circuit Court in the year of our Lord, one thousand eight hundred and thirty-nine.
Wayne County.		

The grand jurors chosen, selected and sworn, in and for the county of Wayne, in the name and by the authority of the People of the State of Illinois, upon their oaths present, that Absalom Nixon, late of the county aforesaid, laborer, on the twenty-third day of October, in the year of our Lord, one thousand eight hundred and thirty-eight, with force and arms, at and in the county aforesaid, in and upon one Adam, a man of color, then and there being a deformed person, and by reason of his being such deformed person, being unable to walk, or otherwise to move himself from place to place, and also, then and there being deficient in voice, so as to be unable to call aloud, and in the peace of God and of the people of the state of Illinois, then and there, also being unlawfully, did make an assault, and then and there forced and threw the said Adam from a certain wagon in which he the said Adam then and there was, to and upon the ground, the said ground then and there being frozen and very cold, and then and there did force and compel the said Adam (so being such deformed person as aforesaid, and also by reason of his being such deformed person, being unable to move himself from place to place as aforesaid, and also being deficient in voice so as to be unable to call aloud as aforesaid), then and there to lie upon the ground, so being frozen and very cold as aforesaid, and then and there did abandon and leave him, the said Adam lying on the ground as aforesaid, to the great pain and torture of the said Adam, and to the great

the word "unlawfully" does not make the count bad. *Perry v. People*, 14 Ills., 496; and it has also been held that the count would be sufficient without the employment of the word "willfully." *McCoy v. State*, 3 Engl., 451.

¹ This count was held sufficient though the words "in the name" etc., were omitted. *Curtis v. People*, Breese, 197, 2d Ed., 257.

² Held to be sufficient in *Nixon v. People*, 2 Scam., 268.

damage and impoverishment of his health and strength of body, with intent, him the said Adam, by the means aforesaid, then and there feloniously, willfully and of his malice aforethought, to kill and murder, and other wrongs to him the said Adam then and there did, to the great damage of him the said Adam, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the people of the state of Illinois.

G. B. SHELLEDY, State's Attorney.

FORM OF AN INDICTMENT FOR FORGERY.¹

State of Illinois, } Of the December Term of the Adams Circuit
Adams County. } ss. Court, in the year of our Lord, one thousand eight
hundred sixty-six.

The grand jurors chosen, selected and sworn, in and for the said county of Adams, in the name and by the authority of the people of the state of Illinois, upon their oaths present, that J. Buchanan Cross, on the 22d day of September, in the year of our Lord one thousand eight hundred and fifty-six, in the county and state aforesaid, did unlawfully, feloniously and falsely make, forge and counterfeit a certain bank check for the payment of money, which said false, forged and counterfeit bank check is in the words and figures following, *to wit.* (*insert exact copy of check*) with intent to damage and defraud one Charles H. Beckwith, contrary to the statute in such case made and provided, and against the peace and dignity of the same people of the state of Illinois.

W. G. EWING, State's Attorney.

INDICTMENT FOR HAVING IN POSSESSION COUNTERFEITING TOOLS.²

State of Illinois, } Of the September term of the Cook Circuit Court,
Cook County. } ss. in the year of our Lord, A. D., one thousand eight
hundred and thirty-eight.

The grand jurors chosen, selected and sworn, in and for the county of Cook, in the name and by the authority of the people of the state of Illinois, upon their oaths present, that John B. Miller, late of said county, on the first day of December, in the year of our Lord, one thousand eight hundred and thirty-seven, in the county aforesaid, one press for coinage, made of iron, otherwise called a "bogus press;" one edging tool, made of iron and steel, adapted and intended for the working of coin around the edges, with grainings apparently resembling those on the edges of coin then and now current in the state aforesaid, *to wit.*, Mexican dollars; one die made of steel, in and upon which then and there were made and impressed the figure, resemblance and similitude of one of the sides, *to wit.*, the eagle side of the coin, then and now current within the state aforesaid, *to wit.*, a

¹ Held to be sufficient in *Cross v. People*, 47 Ills., 154.

² Held sufficient. *Miller v. People*, 2 Scam., 233.

Mexican dollar; two crucibles made of clay and sand, made use of in counterfeiting the coin then and now current within the state aforesaid, *to wit.*, the Mexican dollars, without lawful excuse, then and there knowingly had in his possession, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the state of Illinois.

And the same grand jurors, chosen, selected and sworn, in and for the county aforesaid, in the name and by the authority aforesaid, upon their oaths aforesaid, do further present that John B. Miller, late of said county, on the first day of December, in the year of our Lord, one thousand eight hundred and thirty-seven, in the county aforesaid, one press for coinage made of iron, one edging tool, made of iron and steel, adapted and intended for the working of coin around the edges with grainings, apparently resembling those on the edges of coin, then and now current within the state aforesaid, *to wit.*, Mexican dollars; one die made of steel, in and upon which then and there were made and impressed the figure, resemblance and similitude of one of the sides, *to wit.*, the reverse of the eagle side of coin, then and now current within the state of Illinois, called Mexican dollars; two crucibles made of sand and clay, made use of in counterfeiting the coin then and now current within the state aforesaid, called Mexican dollars, then and there knowingly and unlawfully had in his custody and possession, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same people of the state of Illinois.

A. HUNTINGTON, State's Attorney.

FORM OF AN INDICTMENT FOR HAVING IN POSSESSION FORGED BANK BILLS
WITH INTENT TO PASS THEM.¹

State of Illinois,	} ss.	Of the September term of the Cook Circuit Court, in the year of our Lord, one thousand eight hundred and forty-one.
Cook County.		

The grand jurors chosen, selected and sworn in and for the county of Cook, in the name and by the authority of the People of the State of Illinois, upon their oaths present that Luther Townsend, late of the county of Cook aforesaid, laborer, on the twenty-ninth day of June, in the year of our Lord, one thousand eight hundred and forty-one, at Chicago, in the county of Cook aforesaid, feloniously, and without lawful excuse, had in his custody and possession, with intent to utter and pass the same as true and genuine, divers forged bank notes, commonly called bank bills, *to wit.*, one forged bank bill or note purporting to have been issued by the Bank of Illinois, with intention to defraud the said Bank of Illinois, which said forged bank bill or note is in the words and figures following, *to wit.* (*here insert an exact copy of the forged note*), he, the said Luther Townsend, then and there well knowing the said bank notes or bills to be forged, contrary

¹ Held sufficient in *Townsend v. People*, 3 Scam., 327.

to the form of the statute in such case made and provided, and against the peace and dignity¹ of the People of the State of Illinois.

J. LAMBORN, State's Attorney.

FORM OF AN INDICTMENT FOR MURDER BY STRIKING WITH A STICK.²

State of Illinois, } Of the October term of the Lake Circuit Court, in
Lake County. } ss. the year of our Lord, one thousand eight hundred
and fifty-six.

The grand jurors chosen, selected and sworn in and for the county of Lake, in the State of Illinois, in the name and by the authority of the People of the State of Illinois, upon their oaths present that William Jackson, *alias* David Jones, late of said county, on the fourth day of August, in the year of our Lord, one thousand eight hundred and fifty-six, at the county aforesaid, in and upon one Roman Morris in the peace of the said people then and there being, did then and there unlawfully, willfully, feloniously, and of his malice aforethought, make an assault, and that the said William Jackson, *alias* David Jones, with a certain stick of the length of three feet and of the thickness of three inches, which he, the said William Jackson, *alias* David Jones, in his hands then and there had and held, in and upon the right side of the head and the right jaws and upon the back of the neck and spine of him, the said Roman Morris, did then and there unlawfully, willfully, feloniously, and of his malice aforethought, strike, beat and wound, giving to the said Roman Morris, then and there, with the stick aforesaid, several mortal wounds and bruises, of which said mortal wounds and bruises he, the said Roman Morris, on the day and year last aforesaid, at the county aforesaid, died.

And so the grand jurors aforesaid, upon their oaths aforesaid, do say that the said William Jackson, *alias* David Jones, him, the said Roman Morris, in manner and form aforesaid, on the day and year last aforesaid, at the county aforesaid, unlawfully, willfully, feloniously and of his malice aforethought, did kill and murder, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

CARLOS HAVEN, State's Attorney.

FORM OF AN INDICTMENT FOR PRACTICING THE CONFIDENCE GAME.³

State of Illinois, } Of the March term of the St. Clair Circuit Court
St. Clair County. } ss. in the year of our Lord, one thousand eight hundred and sixty-eight.

The grand jurors chosen, selected and sworn in and for the county of St.

¹ In the original the words "against the peace of the People of the State of Illinois and their dignity," were used instead of the words now used.

² Held sufficient in *Jackson v. People*, 18 Ills., 269.

³ Held sufficient. *Morton v. People*, 47 Ills., 469.

Clair, in the name and by the authority of the People of the State of Illinois,¹ upon their oaths present, that Thomas Morton and James Stewart did on the 18th day of February, in the year of our Lord one thousand eight hundred and eighty-eight, in the county of St. Clair aforesaid, unlawfully and feloniously obtain from one Daniel Hughes thirty dollars of his money, by means and by use of the confidence game, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois.

And the jurors aforesaid, in the name and by the authority aforesaid, upon their oaths aforesaid, do further present that Thomas Morton and James Stewart, on the day and year aforesaid, and in the county aforesaid, did unlawfully and feloniously obtain from Daniel Hughes, one United States legal tender treasury note for the payment of ten dollars and of the value of ten dollars, one bank note for the payment of ten dollars and two bank notes for the payment of five dollars each, and of the value of five dollars, the personal property of the said Daniel Hughes, by means and by use then and there of the confidence game, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the People of the State of Illinois.

J. B. HAY, State's Attorney.

§ 818. *Amendments.* — Since the grand jury has the exclusive right to find indictments, the court has no power to authorize their alteration or amendment.² But in some of the states it has been held that the caption, which is considered as no part of the indictment, may be amended,³ or if a mistake is made in stating the time, it was found that such mistake may be corrected by evidence.⁴ Where an indictment is found to be defective, the practice in this state is to have the same or another grand jury find another in the proper form.

¹ This count was held sufficient, though the words "in the name and by the authority of the People of the State of Illinois," required by the constitution, Art. VI., § 33, were omitted in the original. *Morton v. People*, 47 Ills., 469.

² 4 Bur., 2569; *Sanders v. State*, 2 Texas, 119; *State v. Kennedy*, 36 Vt., 563; *McKinley v. State*, 8 Humph., 72; *McCorkle v. State*, 14 Ind., 39; *McGuire v. State*, 35 Missis., 366; *State v. Schricker*, 29 Mo., 265; *State v. McCarty*, 2 Chand., 199.

³ *State v. Moore*, 1 Ind., 548; *Moody v. State*, 7 Blackf., 424; *Dennis v. State*, 5 Pike, 230; *State v. McCarthy*, 2 Pin. Wis., 513; *State v. Emmet*, 23 Wis., 632; *Com. v. Brown*, 116 Mass., 339.

⁴ *Com. v. Hines*, 102 Mass., 33.

SECTION IV.

ARREST UPON INDICTMENT AND ADMITTING TO BAIL.

§ 819. Order Fixing the Amount of Bail.

820. Capias.

821. Amount of Bail Indorsed on Writ.

822. Service and Return of Capias—Bail.

823. Passing Through Other Counties.

824. Costs.

825. Letting to Bail.

826. Recognizance.

§ 819. Order Fixing Amount of Bail.—“When an indictment is found as a true bill, if the offense is bailable, the court shall make an order fixing the amount of bail to be required of the accused. When the court orders process against the accused returnable forthwith, the amount of bail need not be fixed until the accused is brought into court.”¹

§ 820. Capias. —“The clerk of the court in which the indictment is found shall immediately issue process of capias for the apprehension of each person indicted, directed to the sheriff, coroner or any constable of the county where such person then is supposed to be. When deemed necessary, warrants may issue to different counties at the same time.”²

§ 821. Amount of Bail Indorsed on Writ. —“When not otherwise ordered by the court, the clerk shall indorse on the process the amount of bail required by order of the court, but when the court shall order the process returnable immediately, such indorsement shall not be made, but the capias shall require the accused to be arrested and brought immediately to court.”³

¹ R. S., 409, § 414.

² Id., 415. There is no reasonable objection to the issue of a capias to be used by the bail to procure the surrender of their principal to the sheriff in the discharge of the recognizance. *People v. Phelps*, 17 Ills., 200.

³ R. S., 409, § 416.

FORM OF CAPIAS FOR ARREST ON AN INDICTMENT.

State of Illinois, } ss. The People of the State of Illinois, to the sheriff,
 Adams County. } coroner or any constable of said (or —) county.

We command you that you take C. D., if to be found in your county, and him safely keep, so that you have his body before the circuit court of said county of Adams, on the first day of the next criminal term thereof, to be holden at the court house on the — Monday in the month of — next, (or “bring him forthwith before the circuit court of said county of Adams, now in session in the city of Quincy in the said county”) to answer us concerning the crime of (*here insert the name or a description of the crime*) with which he stands charged in a certain bill of indictment preferred against him by the grand jury of said county, filed of record in our said court, and have you then and there this writ, and make return thereof in what manner you execute the same.

Witness, N. M., clerk, and the seal of our said circuit court, at Quincy, this — day of —, in the year of our Lord one thousand eight hundred and seventy—
 N. M., Clerk.

(*If not returnable forthwith the writ should be indorsed*). “The officer executing this writ is directed to require bail in the sum of — dollars.”

By order of the court.

Attest, N. M., Clerk.

§ 822. **Service and Return of Capias.—Bail.** — “The sheriff, or in case of his absence or inability, the coroner or some one of the constables of the county to which the capias is directed, shall arrest the person named in the warrant, and if the offense is bailable and the writ is not returnable forthwith, let him to bail if sufficient bail is offered, or if the offense is not bailable or sufficient bail is not offered, take his body to the jail of the county where the capias is returnable, and deliver him together with the capias to the keeper of the jail, there to remain until discharged in due course of law. If the process is returnable forthwith, the accused shall be immediately brought into court, when he shall be either committed, bailed or tried, as the court may direct.”¹

§ 823. **Passing Through Other Counties.** — “The officer having the custody of a prisoner may pass through any counties which lie in his route between the place of arrest and the

¹ R. S., 409, § 417.

county to which he is taking the prisoner, and may lodge the prisoner in any jail on his route for safe custody for one night or more, as occasion may require."¹

§ 824. *Costs.* — "The county where the indictment is found shall pay to the officer his reasonable charges for his services in bringing the offender from another county."²

§ 825. *Letting to Bail.* — "The officer making the arrest shall let the accused to bail, by his entering into recognizance in the form required by law, in the amount specified in the process, with one or more sufficient sureties to be approved by the officer."³

FORM OF RECOGNIZANCE ON ARREST AFTER INDICTMENT.⁴

State of Illinois, }
Adams County. } ss.

Know all men by these presents, That we, C. D., E. F.⁵ and G. H., of, etc., are held and firmly bound unto the People of the State of Illinois in the penal sum of (*insert the amount specified and indorsed on the writ*)⁶ dollars for the payment of which well and truly to be made, we bind ourselves our heirs, executors or administrators, severally and firmly by these presents.

Witness our hands and seals this — day of —, in the year of our Lord, one thousand eight hundred and seventy—.

The condition of the above obligation is such, that if the above bounden C. D. shall personally be and appear at the circuit court, in and for the county of Adams and State Illinois, on the first day of the next term thereof, to be held at the court-house in Quincy, in the said county on the — Monday in the month of — next, at the opening of the court on that day, and from day to day and term to term, and from day to day of each term, until the final sentence or order of the court, then and there to an-

¹ R. S., § 118.

² Id., 409, § 419.

³ Id., § 420.

⁴ No particular form is prescribed for a recognizance. *Shattuck v. People*, 4 Scam., 477; but it must be to the people, Id.

⁵ A recognizance by a surety only where the defendant has not appeared, has never been in custody or been served with process, is not binding. *People v. Slayton*, Breese, 257, 2nd Ed., 329. But the bond is of itself evidence that the court required a bond to be taken. *Chumasero v. People*, 18 Ills., 405.

⁶ If the bond is for a larger sum than is directed by the court, it is a nullity; otherwise, if it is for a less sum. *Chumasero v. People*, 18 Ills., 405.

swer to an indictment preferred against him¹ by the grand jury of the county aforesaid, at the suit of the People of the State of Illinois, for and concerning the crime of (*here insert the name or description of the crime*), with which the said C. D. stands charged in said court, and shall not depart thence without leave of said court, then this recognizance to be void, otherwise to remain in full force and virtue.

Witness our hands and seals this — day of —, A. D. 18—.

C. D. [SEAL.]

E. F. [SEAL.]

G. H. [SEAL.]

I certify that the above recognizance was taken and entered into before, and approved by me this — day of —, A. D. 18—.

G. C., Sheriff of A. C., Ills.

§ 826. *Recognizance.* — A recognizance is not void because it fails to show that the bail was fixed by the court and indorsed on the writ by the clerk,² nor if taken in open court, because taken for a larger sum than that indorsed on the writ.³ A recognizance void as to part is void as to the whole sum named.⁴ Where the file mark has been omitted on a recognizance it may at a subsequent term be filed, *nunc pro tunc* by order of the court.⁵

¹ Where a recognizance recited that the grand jury "made a presentment," and was conditioned to appear and answer "said presentment," it was held that it sufficiently appeared that an indictment had been found. *Wood v. People*, 16 Ills., 171.

² *Vancel v. People*, 16 Ills., 120.

³ *Chumasero v. People*, 18 Ills., 405.

⁴ *Waugh v. People*, 17 Ills., 560.

⁵ *Farlan v. People*, 13 Ills., 9.

SECTION V.

COUNSEL—MOTION TO QUASH INDICTMENT—ARRAIGNMENT—PLEAS.

- § 827. Appointment of Counsel for the Accused—Compensation.
- 828. Private Consultation with Counsel.
- 829. Copy of Indictment.
- 830. Motion to Quash Indictment.
- 831. When Made.
- 832. In what Cases.
- 833. Cases Enumerated.
- 834. As to the Discretion of the Court in Granting a Motion to Quash an Indictment.
- 835. The Arraignment.
- 836. Plea.
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- 838. Standing Mute.
- 839. Order of Pleading.
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- 841. Pleas to the Jurisdiction.
- 842. Demurrer, when Proper.
- 843. Demurrers Classified and Defined—When to be Special—To be Overruled if there is one Good Count.
- 844. What Objections may be Reached by a Demurrer.
- 845. Judgment on a Demurrer—Answering Over.
- 846. What may be Plead in Abatement and what in Bar.
- 847. Cases Enumerated where a Plea in Abatement is Proper.
- 848. Requisites of a Plea in Abatement.
- 849. Procedure where a Plea in Abatement has been Plead.
- 850. Evidence.
- 851. Judgment on Plea in Abatement—Answering Over.
- 852. Defendant may Plead Several Pleas at the Same Time.
- 853. What may be Proved under a Plea of Not Guilty
- 854. Plea of Not Guilty may be Withdrawn.
- 855. Requisites of a Former Conviction or Acquittal.
- 856. Pardon.
- 857. Statute of Limitations.

§ 827. Appointment of Counsel for the Accused—Compensation.—
The constitution of this state provides that “in all criminal

prosecutions the accused shall have the right to appear and defend in person and by counsel.”¹ And it is also provided by statute that “every person charged with crime shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the court shall assign him competent counsel, who shall conduct his defense.”² The court may compel the counsel as an officer of the court, subject to its authority to defend the accused against unjust conviction.³ In making the defense the counsel only performs an official duty for which no compensation is provided; therefore he cannot recover from the county pay for such services.⁴

§ 828. **Private Consultation with Counsel.** — The statute provides that “in all cases counsel shall have access to persons confined, and shall have the right to see and consult such persons in private.”⁵ And there is another statute which makes an officer having the custody of the accused liable to him for a penalty of one hundred dollars for refusing to allow him to see and consult with any practicing attorney in this state which the accused may desire to see.⁶ Whether such officer for such refusal may also be punished for a palpable omission of duty under the statute,⁷ does not seem clear.

§ 829. **Copy of Indictment.** — “Every person charged with treason, murder or other felonious crime, shall be furnished, previous to his arraignment, with a copy of the indictment, and a list of the jurors and witnesses. In all other cases he shall at his request, or the request of his counsel, be furnish-

¹ R. S., 60 Const. of Ills., Art. II., § 9.

² R. S., 410, § 422.

³ *Vise v. Hamilton*, 19 Ills., 78, 79; *Carpenter v. County of Dane*, 9 Wis., 274; *County of Dane v. Smith*, 13 Wis., 583.

⁴ *Vise v. Hamilton*, 19 Ills., 78; *Rowe v. Yuba County*, 17 Cal., 61; *contra*, *Web v. Baird*, 6 Ind., 13, 18; *Blythe v. State*, 4 Ind., 525; *Carpenter v. County of Dane*, 9 Wis., 274; *County of Dane v. Smith*, 13 Wis., 583; *Hall v. Washington*, 2 Greene Iowa, 473; *Samuels v. Dubuque*, 13 Iowa, 536; *Com. v. Hall*, 7 Watts, 290.

⁵ R. S., 410, § 422.

⁶ *Id.*, 387, § 229.

⁷ *Id.*, 383, § 208; *Id.*, 395, § 292.

ed with a copy of the indictment and a list of the jurors and witnesses."¹

§ 830. **Motion to Quash Indictment.** — "All exceptions which go merely to the form of an indictment shall be made before trial, and no motion in arrest of judgment or writ of error, shall be sustained for any matter not affecting the real merits of the offense charged in the indictment. No indictment shall be quashed for the want of the words, "with force and arms," or "of occupation, or place of residence of the accused," nor "by reason of the disqualification of any grand juror."²

§ 831. **When Made.** — The words of the statute requiring the motion to "be made before trial,"³ have been construed to mean before pleading,⁴ and since these motions are of a dilatory character they are required to be made in apt time,⁵ that is at the earliest practicable moment.⁶

§ 832. **In What Cases.** — Where a defect appears upon the face of the indictment or of a count in it, a motion to quash the indictment or count should be sustained by the court;⁷ but where the defect does not so appear, the better practice would be to plead it in abatement;⁸ although there are numer-

¹ R. S., 409, § 421. If a copy of the indictment and a list of the jurors and witnesses are not furnished on demand made before pleading it is error, but the error will not be available unless the fact is preserved by a bill of exceptions. *McKenney v. People*, 2 Gilm., 540.

² R. S., 408, § 411.

³ *Curtis v. People*, Breese, 197, 2d Ed., 256; *Stone v. People*, 2 Scam., 333; *Townsend v. People*, 3 Scam., 329; *Connolly v. People*, 3 Scam., 477.

⁴ *Guykowski v. People*, 1 Scam., 476; *Winship v. People*, 51 Ills., 296; *Foster*, 261; *Rex v. Rockwood*, Holt, 684; *Weinzorpfli v. State*, 7 Blackf., 186; *Thomason v. State*, 22 Ga., 499.

⁵ *Winship v. People*, 51 Ills., 298.

⁶ *Holloway v. Freeman*, 22 Ills., 202.

⁷ *State v. Rickey*, 4 Halst., 293; *Wickwire v. State*, 19 Conn., 477; *Com. v. Church*, 1 Barr, 105; *Broward v. State*, 9 Fla., 422; *Holloway v. Freeman* 22 Ills., 201; *Rowan v. Taylor*, 1 Pin. Wis., 235; *Dutel v. State*, 4 Greene Iowa, 125.

⁸ *Holloway v. Freeman*, 22 Ills., 201; *Cruikshank v. Brown*, 5 Gilm., 77; *Schoonhoven v. Gott*, 20 Ills., 46; *Reaugh v. McConnell*, 36 Ills., 373; *Widdett v. Hamilton*, 52 Ills., 180; *State v. Hensley*, 7 Blackf., 324; *McNab v. Bennett*, 66 Ills., 157.

ous authorities holding that the facts outside of the record making an indictment defective may be made to appear by affidavit¹ or the admission of the prosecuting attorney.²

§ 833. Cases Enumerated.—A motion to quash is the proper and only remedy where the indictment omits to state that it was found upon the “oath” of the grand jury,³ or where the name of the prosecutor is not indorsed on the indictment when required by the statute;⁴ or where the names of the witnesses on whose evidence the indictment was found are not indorsed thereon;⁵ or where there was an irregularity in impaneling the grand jury;⁶ or where there is not sufficient certainty in the allegations of the count or indictment;⁷ or where a fact appears by way of recital and not by positive averment;⁸ or where the allegations in a count are repugnant, that is, contradict each other;⁹ or where the count is bad for duplicity.¹⁰ An indictment or count may be quashed on motion if not in the name and by the authority of the People of the State of Illinois,¹¹ or if it does not conclude “against the same People of the State of Illinois”;¹² or if the words “A true bill,” signed by the foreman of the grand jury, are not

¹ 1 Bish. Cr., P. § 763; Reg. v. Hearn, 9 Cox C. C., 433, 436; State v. Horton, 63 N. C., 595; Reg. v. Stockley, 2 Gale & D., 728; Stone v. People, 2 Scam., 333; Norris House v. State, 3 Greene Iowa, 518.

² 1 Bish. Cr. P., § 763; Rex v. Pewterus, 2 Stra., 1026.

³ Curtis v. People, Breese, 197, 2d Ed., 353; State v. Ostrander, 18 Iowa, 437.

⁴ 2 R. S., 408, § 409; Verzain v. People, 40 Ills., 397; Winship v. People, 51 Ills., 296.

⁵ McKinney v. People, 2 Gilm., 540, 552.

⁶ Stone v. People, 2 Scam., 338; Dutel v. State, 4 Greene Iowa, 125; Dixon v. State, 4 Greene Iowa, 381; *contra*, State v. Hensley, 7 Blackf., 324.

⁷ Stone v. People, 2 Scam., 338.

⁸ Townsend v. People, 3 Scam., 326.

⁹ State v. Johnson, 5 Jones N. C., 221.

¹⁰ State v. Brown, 8 Humph., 89; People v. Shotwell, 27 Cal., 394; Shafer v. State, 26 Ind., 191; Simons v. State, 25 Ind., 331; Com. v. Tuck, 20 Pick., 361.

¹¹ Whitesides v. People, Breese, 4, 2d Ed., 21; Donnelly v. People, 11 Ills., 552; Wright v. People, 15 Ills., 417; Wright v. People, 59 Ills., 94.

¹² U. S. v. Crittenden, Hemp, 61; U. S. v. Lemmons, Hemp, 62.

indorsed on the indictment;¹ or if the indictment² or count³ does not allege facts sufficient to constitute a crime; but according to some of the decisions, neither the indictment nor count should be quashed on motion in a doubtful case, for in such case the court should require the defendant to demur.⁴ All of these objections, except that the indictment or count does not allege facts sufficient to constitute a crime,⁵ are waived by pleading and going to trial.⁶ The motion to quash the indictment, like a demur, must distinctly specify wherein the indictment is insufficient.⁷

§ 834. **As to the Discretion of the Court in Granting a Motion to Quash an Indictment.**—It has been held that the granting of a motion to quash an indictment for insufficiency was in the discretion of the court,⁸ and that therefore error does not lie on its refusal.⁹ But the rule is otherwise in this state.¹⁰

§ 835. **The Arraignment** consists in calling the prisoner to the bar by his name, commanding him to hold up his hand, reading over to the accused the indictment and asking him whether he is guilty or not guilty of the offense therein

¹ *Nomaque v. People*, Breese, 109, 2d Ed., 145; *Gardiner v. People*, 3 Scam., 85; *State v. Freeman*, 13 N. H., 488; *Dutel v. State*, 4 Greene Iowa, 125; *Hughes v. State*, 4 Iowa, 554.

² 1 Bish. Cr. P., § 772, Doug., 253; *Com. v. Clark*, 6 Grat., 675; *People v. Eckford*, 7 Cowen, 535; *Com. v. Huff*, 14 Grat., 648; *State v. Beard*, 1 Dutch., 384; *State v. Robinson*, 9 Foster N. H., 727; *Rex v. Burket*, Andr., 230; *R. v. Simon*, 1 Bur., 516.

³ *Jones v. State*, 6 Humph., 435; *State v. Woodard*, 21 Mo., 265; *State v. Wishon*, 15 Mo., 503; *King v. State*, 10 Texas, 281; *Scott v. Com.*, 14 Grat., 687.

⁴ 1 Whart. Cr. L., § 519; *Com. v. Eastman*, 1 Cush., 189; *Respublica v. Cleaver*, 4 Yeates, 69; *State v. Smith*, 1 Murphy, 713; *People v. Eckford*, 7 Cowen, 535.

⁵ *State v. Potter*, 28 Iowa, 554.

⁶ *Hughes v. State*, 4 Iowa, 554; *State v. Axt*, 6 Iowa, 511.

⁷ *State v. Maurer*, 7 Iowa, 406.

⁸ 1 Whart. Cr. L., § 519; *People v. Eckford*, 7 Cowen, 535.

⁹ *Com. v. Eastman*, 1 Cush., 189; *State v. Conrad*, 21 Mo., 271; *State v. Putnam*, 38 Me., 296.

¹⁰ *Guykowski v. People*, 1 Scam., 476; *Conolly v. People*, 3 Scam., 474; *Winship v. People*, 51 Ills., 296; *Whitesides v. People*, Breese, 4, 2d Ed., 21; *Fairlee v. People*, 11 Ills., 4.

charged against him.¹ The indictment is usually read to the prisoner, though a copy of the indictment has previously been furnished to him.² But it is competent for the prisoner with the consent of the court to waive the reading; and if thus waiving he pleads to the indictment, the transaction will be equivalent to a formal arraignment and plea.³ If, however, no plea is entered by the accused or his counsel, there is no issue, and without an issue there is nothing to be tried, in which case on conviction, it is error to sentence the accused.⁴ The arraignment and plea in cases of felonies are essential to the formation of the issue, but in cases of misdemeanor punishable only by a fine, the plea of not guilty may be entered either by the accused or his counsel without arraignment.⁵ A plea by an attorney of a party indicted for a felony, filed without the arraignment of the accused in his absence is a nullity.⁶ In cases of felony in all proceedings, subsequent to the arraignment, the accused must appear in person; and the record must show such appearance.⁷ If it does not appear in such cases from the record that the accused was furnished with a copy of the indictment and a list of the witnesses, and required to plead before he was placed on trial, the judgment will be reversed.⁸

§ 836. Plea. — The statute provides that “upon the arraignment of the prisoner, it shall be sufficient without complying

¹ 1 Bish. Cr. P., § 728; 1 Arch. C. P. & Pl., 350.

² *Rex v. Hensey*, 1 Bur., 642.

³ 1 Bish. Cr. P., 733; *Goodin v. State*, 16 Ohio S., 344; *Washburn v. People*, 10 Mich., 372; *Johnson v. People*, 22 Ills., 314.

⁴ *Johnson v. People*, 22 Ills., 317; *Douglass v. State*, 3 Wis., 820; *Powell v. U. S.*, 1 Morris, 17; *Sartorius v. State*, 24 Missis., 602; *Aylesworth v. People*, 65 Ills., 301; *State v. Hardie*, 3 Murphy, 232.

⁵ 1 Bish. Cr. P., § 268; *Johnson v. People*, 22 Ills., 317; *Ex parte Tracy*, 25 Vt., 93; *Warren v. State*, 19 Ark., 214; *U. S. v. Leckie*, Sprague, 227; *U. S. v. Mayo*, 1 Curt. C. C., 433.

⁶ *McQuillen v. State*, 8 Sm. & M., 587; *Sperry's Case*, 9 Leigh, 623; *Sailer v. State*, 1 Harring., 357; *Dunn v. Com.*, 6 Barr, 384.

⁷ 1 Arch. C. P. & Pl., 351; *Sperry's Case*, 9 Leigh, 623; *Sailer v. State*, 1 Harring., 357; *Dunn v. Com.*, 6 Barr, 384.

⁸ *McKinney v. People*, 2 Gilm., 540; *Yundt v. People*, 65 Ills., 374; *contra*, *State v. Winstrand*, 37 Iowa, 110.

with any other form, to declare orally, by himself or his counsel, that he is not guilty; which plea shall be immediately entered upon the minutes of the court by the clerk, and the mention of the arraignment, and such plea shall constitute the issue between the people of the state and the prisoner. And if the clerk neglects to insert in the minutes the said arraignment and plea, it may and shall be done at any time by order of the court, and then the error or defect shall be cured.”¹

§ 837. **Plea of Guilty Explained.** — “In cases where the party pleads “guilty,” such plea shall not be entered until the court shall have fully explained to the accused the consequences of entering such plea; after which, if the party persists in pleading “guilty,” such plea shall be received and recorded, and the court shall proceed to render judgment and execution thereon, as if he had been found guilty by a jury. In all cases where the court possesses any discretion as to the extent of the punishment, it shall be the duty of the court to examine witnesses as to the aggravation and mitigation of the offense.”²

§ 838. **Standing Mute.** — “In all cases where the party on being arraigned, obstinately stands mute or refuses to plead, the court shall order the plea if “not guilty” to be entered on the minutes, and the trial, judgment and execution shall proceed in the same manner as it would have done if the party had pleaded “not guilty.”³

§ 839. **Order of Pleading.** — The following is a general outline of the order of pleading in criminal cases:⁴

1. Pleas to the Jurisdiction.
2. Demurrers.
3. Dilatory Pleas Including Pleas in Abatement.
4. Pleas in Bar of the Indictment.
 1. Autrefois Acquit.
 2. Autrefois Convict.

¹ R. S., 410, § 423.

² Id., § 424.

³ Id., § 425.

⁴ 1 Chitty Cr. L., 434; *McQuillen v. State*, 8 Sm. & M. 587.

5. Pleas to the Matter of the Indictment.

1. Not Guilty.

2. Special Pleas.

It has been held that it is too late to introduce a plea in abatement after the defendant has pleaded in bar,¹ unless, indeed, he obtains leave of the court to withdraw the one and substitute the other, for the plea in bar tendered alone, admits whatever is a ground only of abatement.² So any plea to an indictment admits its genuineness as a record.³

§ 840. **As to Pleading in Bar and in Abatement at the Same Time.** — But according to some of the authorities, a defendant may plead any number of pleas at one time, whether in bar or in abatement, provided they are not repugnant the one to the other.⁴ And it has been held that the defendant cannot be compelled at the trial in a criminal case to select and rely upon one of several pleas in abatement submitted by him.⁵ Although there is good authority for saying that in prosecutions for a misdemeanor, the defendant cannot plead over to the offense,⁶ together with a plea in abatement, while he may in cases of a felony.⁷

1. PLEAS TO THE JURISDICTION.

§ 841. **When Necessary.** — A plea to the jurisdiction of the court may be interposed without making any answer to the

¹ 1 Chitty Cr. L., 447; *Rex v. Purchase*, C. & M., 617; *State v. Farr*, 12 Rich., 24; *State v. Montague*, 2 McCord, 257; *Com. v. Butler*, 1 Allen, 4; *Hastings v. Bolton*, 1 Allen, 529; *McQuillen v. State*, 8 Sm. & M., 587; *Com. v. Dedham*, 16 Mass., 146.

² *Eberly v. Moore*, 24 How. U. S., 147, 158; *Rex v. Knowles*, 1 Salk., 47; *Kinloch's Case*, Foster, 16.

³ *State v. Clarkson*, 3 Ala., 378.

⁴ 2 R. S., 778, § 29; 1 Chitty Cr. L., 447; 1 Bish. Cr. P., § 753; 2 Hawks P. C. C., 23, § 128; *State v. Allen*, 1 Ala., 442; *Buzzard v. State*, 20 Ark., 106; *Com. v. Long*, 2 Va. Cas., 318; *Schram v. People*, 29 Ills., 162; *contra*, *Hill v. State*, 2 Yerg., 248; *State v. Copeland*, 2 Swan Tenn., 626.

⁵ *State v. Greenwood*, 5 Port., 474, 483; *Com. v. Long*, 2 Va. Cas., 318.

⁶ 1 Chitty Cr. L., 447.

⁷ *Id.*

charge itself,¹ but such a plea is seldom necessary in this state, for an objection for want of jurisdiction of the court over the subject matter may be taken at any time without pleading it.² The judgment in all cases on overruling a plea to the jurisdiction must be that the defendant answer over to the charge in the indictment.³

2 DEMURRERS.

§ 842. **Demurrers, when Proper.**—Whenever an indictment or plea does not allege facts sufficient to constitute a crime or defense, or is otherwise defective in substance or form, the objection may be taken by demurrer,⁴ though the objection to an indictment is usually taken by a motion to quash it,⁵ yet it has been held that an indictment should not be quashed on motion in a doubtful case, for the reason that the objection should be taken by demurrer.⁶ A demurrer to an indictment will not be received while there is a plea pending,⁷ although the court in its discretion may permit⁸ or refuse to permit⁹ the defendant to withdraw his plea and demur when he cannot demur as of right.

§ 843. **Demurrers Classified and Defined—When to be Special—To be Overruled if there is One Good Count.**—Demurrers are of two kinds, general and special; the latter being called special because they assign some special cause of demurrer, while the former assign none.¹⁰ At common law duplicity can be reached only by a motion to quash or by special de-

¹ 2 Hale P. C., 256; 1 Bish. Cr. P., § 736; 1 Whart. Cr. L., 534.

² 1 East, 352; 6 East, 583; Reg. v. Heane, 9 Cox. C. C., 433; Bell v. Com., 8 Grat., 600; Justice v. State, 17 Ind., 56.

³ 1 Bish. Cr. P., § 736; Rex v. Hollis, 1 Trem. P. C., 302.

⁴ 1 Whart. Cr. L., § 527; Lazier v. Com., 10 Grat., 708; Rex v. Fearnley, 1 T. R., 316.

⁵ Ante § 832.

⁶ Com. v. Eastman, 1 Cush., 189; Respublica v. Cleaver, 1 Murphy, 213; People v. Eckford, 7 Cowen, 535.

⁷ 1 Bish. Cr. P., § 780.

⁸ Reg. v. Purchase, C. & M., 617; Reg. v. Faderman, 1 Den. C. C., 565; Reg. v. Shields, 3 Crawf. & Dix C. C., 330.

⁹ Reg. v. Brown, 17 Law J. N. S. M. C., 145.

¹⁰ 1 Bish. Cr. P., § 775.

murrer,¹ but it has been held that as a general rule an objection to the mere form of an indictment or plea may be taken on a general demurrer to the same effect as upon a special,² although under our practice a demurrer to an indictment or plea for a mere defect of form must distinctly specify wherein the defect consists.³ A general demurrer to the whole indictment, containing one good count, must be overruled,⁴ but a demurrer to a specified count in an indictment which is bad may be sustained without in any way affecting the counts which are good.⁵

FORM OF DEMURRER TO AN INDICTMENT.

State of Illinois, }
 ——— County. } ss.

IN CIRCUIT COURT.

To the ——— Term, A. D. 18—.

C. D.

ads. }

The People of the
 State of Illinois. }

And the said C. D., in his own proper person comes into court here, and having heard the said indictment read, says that the said indictment and each and every count therein and the matters therein contained, in manner and form as the same are above stated and set forth are not sufficient in law, and that he the said C. D. is not bound by law to answer the same; and this he is ready to verify; wherefore for want of a sufficient indictment, in this behalf the said C. D. prays judgment, and that by the court he may be dismissed and discharged from the said premises in the said indictment specified. (*If it is desired to make the demurrer special, then add*) And the said C. D. assigns the following special causes for demurrer to the said indictment, and to each and every count therein, *to wit* :

1st. That (*here insert the special causes of demurrer*).

C. D.

¹ 1 Bish. Cr. P., §§442, 775; *Kilbourn v. State*, 9 Conn., 563; *Franey v. True*, 26 Ills., 184; *Armstrong v. Webster*, 30 Ills., 333; *contra*, *State v. Merrill*, 44 N. H., 624; *State v. Howe*, 1 Rich., 260.

² *Lazier v. Com.*, 10 Grat., 708; *Com. v. Jackson*, 2 Va. Cas., 501.

³ *Armstrong v. Webster*, 30 Ills., 333; *Bentham v. State*, 1 Iowa, 542; *State v. Maurer*, 7 Iowa, 426.

⁴ *Ingraham v. State*, 39 Ala., 247.

⁵ *Turner v. State*, 40 Ala., 21,

FORM OF A DEMURRER TO A PLEA.

State of Illinois, }
 ——— County. } ss.

IN CIRCUIT COURT.

To the ——— Term, A. D. 18—.

The People of the }
 State of Illinois, }

vs.

C. D. }

And J. P., state's attorney for said county, who prosecutes for the said people in this behalf, as to the said first (*or second*) plea of the said C. D. by him above pleaded, says that the same and the matters therein contained in the manner and form as the same are above pleaded and set forth, are not sufficient in law to bar or preclude the said people of the state of Illinois from prosecuting the said indictment against him, the said C. D.; and that the said people are not bound by the law of the land to answer the same; and this the said J. P., who prosecutes as aforesaid, is ready to verify; wherefore, for want of a sufficient plea in this behalf, he the said J. P., for the said people prays¹ judgment, and that the said C. D. may be convicted of the premises of said indictment specified.

J. P., State's Attorney.

§ 844. What Objections may be Reached by a Demurrer.—Upon a demurrer to an indictment the court must look to the whole record to see whether they are warranted in giving judgment on it;² objections therefore to the jurisdiction of the court to the substance and structure of the indictment are alike reached in this way.³ If the demurrer is to a replication or plea, it is carried back to the plea or indictment, and judgment must be rendered on the demurrer against the party whose pleading was first defective in substance; therefore on demurrer to a plea if the indictment is bad, judgment must be rendered for the defendant;⁴ but possibly the defendant, after pleading not guilty, is estopped from carrying a demurrer to his other pleas back to the indictment.⁵

¹ A demurrer to a plea in abatement is in the same form except that it concludes with praying judgment that the said indictment may be adjudged good, and that the said C. D. may further answer thereto, etc. 1 Bish. Cr. P., § 777.

² 2 Hale P. C., 257.

³ 1 Arch C. P. & Pl., 381; *Rex v. Fearnley*, 1 T. R., 316, 320.

⁴ 1 Chitty Pl., 668; *Snyder v. State Bank*, Breese, 161; *Phoebe v. Jay*, Breese, 268; *McDonald v. Wilkie*, 13 Ills., 22; *P. & O. R. R. Co. v. Neil*, 16 Ills., 269; *Adams v. Hardin*, 19 Ills., 273; *Ward v. Stout*, 32 Ills., 399.

⁵ *Brawner v. Lomax*, 23 Ills., 496; *Wear v. J. & S. R. R. Co.*, 24 Ills., 593;

§ 845. **The Judgment — Answering Over.** — The judgment for the defendant upon demurrer, is that he be dismissed and discharged from the premises.¹ When judgment is against the defendant on a demurrer to an indictment for a misdemeanor, it is final unless the demurrer is permitted to be withdrawn,² and it is in the discretion of the court to allow the defendant to plead over in such a case or not. The defendant cannot insist upon pleading over as a matter of right.³ In felonies the judgment on a demurrer, if against the defendant, in all cases is that he answer over.⁴

3. DILATORY PLEAS INCLUDING PLEAS IN ABATEMENT.

§ 846. **What to be Plead in Abatement and what in Bar.**—Whatever defeats or prevents a conviction on the present indictment, but does not preclude the people from again indicting and convicting the defendant for the offense charged, should be plead in abatement.⁵ But whatever matter of defense shows that the defendant cannot be convicted of any offense should be plead in bar.⁶

§ 847. **Cases Enumerated where a Plea in Abatement is Proper.**—If the name used in the indictment differs in sound from the real name of the defendant, advantage of the misnomer

Wilson v. Myrick, 24 Ills., 33; *Scofield v. Settle*, 31 Ills., 515; *Mt. C. & R. Co. v. Andrews*, 53 Ills., 177; *Claycomb v. Munger*, 51 Ills., 373.

¹ 1 Bish. Cr. P., § 781.

² 2 Hawks P. C. C., 31, § 7; 1 Bish. Cr. P., §§ 783, 784; *State v. Rutlege*, 8 Humph., 32; *People v. Taylor*, 3 Denio, 91; *Com. v. Eastman*, 1 Cush., 189, 192; *Com. v. Foggy*, 6 Leigh, 638; *Reg. v. Gibson*, 8 East, 107, 111.

³ 1 Arch. C. P. & Pl., 381; *Rex v. Taylor*, 5 Dowl. & Ry., 422, 3 B. & Cres., 502, 612; *Reg. v. Birmingham, G. & R.*, 3 Q. B., 223, 224; *State v. Wilkins*, 17 Vt., 151; *McCuen v. State*, 19 Ark., 630; *Bennett v. State*, 2 Yerg., 472; *People v. Taylor*, 3 Denio, 98; *contra*, *Hern v. State*, 1 Ohio, 15; *Com. v. Godard*, 13 Mass., 456; *Foster v. Com.*, 8 Watts & Serg., 77; *Com. v. Barge*, 3 Pa. R., 262; *Cochrane v. State*, 6 Md., 400; *Harrison v. State*, 4 Cold., 195.

⁴ *State v. Merrill*, 37 Me., 329; *Rex v. Taylor*, 5 Dowl. & Ry., 422; 3 B. & Cres., 502, 612; *Rex v. Gibson*, 8 East, 107; *contra*, 2 Hale P. C., 225, 257; *Reg. v. Faderman*, 1 Den. C. C., 468, 570; 3 Car. & K., 358.

⁵ 1 Chitty Pl., 445; *Archibald v. Argall*, 53 Ills., 307.

⁶ 1 Chitty Pl., 469; *Waterman v. Tuttle*, 18 Ills., 293.

can be taken only by a plea in abatement.¹ There is authority for saying that it may be plead in abatement to an indictment that the witnesses on whose testimony it was procured were not sworn;² that the grand jury, finding the indictment consisted of more than twenty-three³ or less than sixteen⁴ persons; that there was an irregularity in summoning the grand jury;⁵ that the grand jurors were not selected according to the directions of the statute⁶ or were not sworn.⁷ Formerly the disqualification of a grand juror,⁸ the omission of the occupation⁹ or the place of residence¹⁰ of the accused in the indictment could be plead in abatement, but under our statute no indictment can be quashed for these reasons.¹¹ Whether a

¹ *State v. Hughes*, 1 Swan, 261; *Com. v. Dedham*, 16 Mass., 146; *Turns v. Com.*, 6 Met., 225; *Lynes v. State*, 5 Porter, 236; *State v. Lovey*, 2 Brev., 395; *Smith v. State*, 7 Ohio, 240; *Davis v. Taylor*, 41 Ills., 405; *Gabe v. State*, 1 Engl., 519; *Dounel v. U. S.*, *Morris Iowa*, 141; *State v. White*, 32 Iowa, 17; *State v. Winstrand*, 37 Iowa, 110; *McDonald v. People*, 47 Ills., 533.

² 1 Bish. Cr. P., § 873; *Middlesex Special Commission*, 6 Car. & P., 90.

³ 1 Bish. Cr. P., § 884; *Sharpshire v. State*, 7 Engl., 190.

⁴ *Brennan v. People*, 15 Ills., 511; *Turk v. State*, 7 Ohio, 240; *Doyle v. State*, 17 Ohio, 222; *Norris House v. State*, 3 Greene Iowa, 513.

⁵ *Brown v. State*, 13 Ark., 96; *Green v. State*, 28 Missis., 687; *Rawles v. State*, 8 Sm. & M., 599; *Baker v. State*, 23 Missis., 243; *State v. Greenwood* 5 Port., 474; *State v. Newer*, 7 Blackf., 307; *Sayle v. State*, 8 Texas, 120; *Stokes v. State*, 24 Missis., 621; *State v. Williams*, 5 Port., 130.

⁶ *Vattier v. State*, 4 Blackf., 73; *Barger v. State*, 6 Blackf., 188; *Hardin v. State*, 22 Ind., 347; *McGuire v. People*, 2 Park. Cr. R., 148; *People v. McCann*, 3 Park. Cr. R., 291.

⁷ *Brennan v. People*, 15 Ills., 515.

⁸ *State v. Rickey*, 5 Halst., 83; *State v. Greenwood*, 5 Port., 474; *Rawles v. State*, 8 Sm. & M., 599; *McQuillen v. State*, 8 Sm. & M., 587; *Baker v. State*, 23 Missis., 243; *Smith v. State*, 19 Conn., 493; *State v. Duncan*, 7 Yerg., 271; *State v. Bryant*, 10 Yerg., 527; *People v. Jewet*, 6 Wen., 386; *Newman v. State*, 14 Wis., 393; *Grubb v. State*, 14 Wis., 393; *State v. Cole*, 17 Wis., 674; *State v. Fee*, 19 Wis., 562; *Bennett v. State*, Mar. & Yerg., 133; *State v. Baker*, 4 Humph., 12; *State v. Dines*, 10 Humph., 512; *Nugent v. State*, 19 Ala., 540; *State v. Foster*, 9 Texas, 65.

⁹ *State v. Moore*, 14 N. H., 451; *Com. v. Clark*, 2 Va. Cas. 401; *State v. Hughes*, 2 Harring. & McH., 479; *Report of Judges*, 3 Binn., 599; *contra*, *State v. Newmans*, 2 Car. Law R., 74; *Morgan v. State*, 19 Ala., 556; *Studstill v. State*, 7 Ga., 2; *State v. McDowell*, 6 Blackf., 49.

¹⁰ 1 Chitty Cr. L., 444.

¹¹ R. S., 408, § 411; *Musick v. People*, 40 Ills., 268; *Byrne v. State*, 12 Wis., 519.

mistake in stating the occupation, addition; description,¹ or residence formerly pleadable in abatement,² can now be plead in abatement, does not seem clear. It is not a good plea in abatement of an indictment that another prosecution for the same offense is depending,³ and in such case the prosecutor cannot be compelled to elect on which he will prosecute,⁴ though in civil cases that a former suit for the same cause is depending is a good plea in abatement.⁵ It has been held that an indictment found by a grand jury without any evidence, or without any lawful or sufficient evidence, might be quashed for that reason;⁶ but the weight of authority seems to be in favor of the doctrine that the court cannot in any way look into the question, whether or not the finding of the grand jury was founded on sufficient proof or inquire as to the incompetency of any or all of the witnesses,⁷ or into the mode in which the grand jury examined the witnesses for the purpose of invalidating the indictment.⁸ So it is not permissible to show by evidence that the offense for which the prisoner is being tried is not in fact the same to which the evidence before the grand jury pointed.⁹

§ 848. Requisites of a Plea in Abatement—Amendment.—Dila-

¹ *Com. v. Lewis*, 1 Met., 151.

² 1 Chitty Pl., 446.

³ 1 Chitty Cr. L., 446; 1 Arch. C. P. & Pl., 358; *Rex v. Stratton*, 1 Doug., 240; *Rex v. Wynn*, 2 East R., 226, 3 Barrows, 1668; *Whitepolis Case*, 3 Coke C., 147; *Com. v. Dunham*, *Thatch.*, C. C., 513; *Hardin v. State*, 23 Ind., 349; *Dutton v. State*, 5 Ind., 533; *U. S. v. Herbert*, 5 Cranch C. C., 87; *Van Horn v. People*, 8 Barb., 158; *Com. v. Drew*, 3 Cush., 279; *Com. v. Murphy*, 11 Cush., 472; *Com. v. Berry*, 5 Gray, 93; *State v. Tisdale*, 2 Dev. & Bat., 149; *Com. v. Lahy*, 8 Gray, 459; *Ld. Raym.*, 920; but see *State v. Yarbrough*, 1 Hawks, 78; *Com. v. Churchill*, 5 Mass., 174; *People v. Goldstien*, 32 Cal., 422.

⁴ *State v. Bunger*, 14 Lou. An. R., 461.

⁵ *Bancroft v. Eastman*, 2 Gilm., 123; *McConnell v. Stettinius*, 2 Gilm., 707; *Buckles v. Harlan*, 54 Ills., 361.

⁶ *People v. Reslenblatt*, 1 Abbott Pr. R., 268.

⁷ *Bloomer v. State*, 3 Sneed, 66; *State v. Tucker*, 20 Iowa, 508.

⁸ *U. S. v. Reed*, 2 Blatch., 435; *State v. Boyd*, 2 Hill S. C., 288; *Turk v. State*, 7 Ohio pt. 2, 240; *State v. Burlingham*, 15 Me., 104; *State v. Logan*, 1 Nev., 509; *State v. Dayton*, 3 Zab., 49.

⁹ *Spratt v. State*, 8 Mo., 247; *Rocco v. State*, 37 Missis., 357.

tory pleas and pleas in abatement are not favored, but must be taken with great strictness.¹ A plea in abatement should begin by praying judgment of the presentment² and conclude with a like prayer and that it be quashed;³ should specifically set forth the grounds of objection;⁴ must be pleaded with strict exactness,⁵ especially in the title of the cause, the court and term, and everything which serves to identify it with the cause in which it is intended to be filed;⁶ must be pleaded without any repugnancy;⁷ must not be double;⁸ should not contain any alterations or interlineations;⁹ must specify truly the names of all of the parties, giving both the Christian and surnames in full,¹⁰ except that the middle name and its initial letter may be omitted;¹¹ must be signed by counsel;¹² must give the people the means of procuring a better indictment;¹³ must be in writing and verified by the affidavit of the person offering the same or of some other person for him,¹⁴ unless it is a plea to the jurisdiction of the court or the matters relied upon to establish the truth thereof appear of

¹ *State v. Wills*, 11 Humph., 222; *Newman v. State*, 14 Wis., 394; *Owens v. Haverly*, 1 Head, 329; *Fowler v. Arnold*, 25 Ills., 284; *Humphrey v. Phillips*, 57 Ills., 135; *Holloway v. Freeman*, 22 Ills., 201.

² *Owens v. Haverly*, 1 Head, 329.

³ *Id.*; *Findley v. People*, 1 Mich., 234; *Rex v. Westby*, 10 East, 85; *Jenkins v. Pepoon*, 2 John C., 312.

⁴ *Brennan v. People*, 15 Ills., 511; *State v. Brooks*, 9 Ala., 10.

⁵ *O'Connell v. Reg.*, 11 Cl. & F., 155; *Cook v. Yarwood*, 41 Ills., 118; *State v. Willis*, 11 Humph., 222.

⁶ *Thomas v. Fowler*, 25 Ills., 284.

⁷ *Cook v. Yarwood*, 41 Ills., 118; *Kimball v. People*, 45 Ills., 297.

⁸ 1 Chitty Pl., 457; *McConnell v. Stettinius*, 2 Gilm., 712; *Findley v. People*, 1 Manning, 234.

⁹ *Holloway v. Freeman*, 22 Ills., 202.

¹⁰ *Id.*, 201; *Thomas v. Fowler*, 25 Ills., 284.

¹¹ *Thompson v. Lee*, 21 Ills., 242; *Miller v. People*, 39 Ills., 457; *Humphrey v. Phelps*, 57 Ills., 135.

¹² 1 Chitty Cr. L., 447; *Holloway v. Freeman*, 22 Ills., 201.

¹³ 1 Chitty Pl., 457; *The American Express Co. v. Haggard*, 37 Ills., 465; *Wilson v. Nevers*, 20 Pick., 20.

¹⁴ *State v. Farr*, 12 Rich., 24; *Rex v. Grainger*, 3 Bur., 1617.

FORM OF A PLEA OF MISNOMER IN ABATEMENT.

James Long, indicted by
the name of George Long.
ads.

And James Long, who is indicted by the name of George Long in his own proper person,³ comes into court here, and having heard the said indictment read, prays judgment that the same may be quashed, because he says that he was baptised⁴ by the name of James,⁵ *to wit.*, at — in the county aforesaid, and by the Christian name of James has also since his baptism hitherto been called and known; without this that he, the said James Long, now is or at any time hitherto has been called or known by the Christian name of George, as by the said indictment is supposed; and this he, the said James Long, is ready to verify; wherefore he prays judgment of the said indictment and that the same may be quashed, etc.

JAMES LONG.

James Long, indicted by⁶
the name of George Long.
ads.

⁸ It is not necessary that the affidavit in support of the plea in abatement should be entitled in the cause where the plea which is probably entitled

"*plea hereunto annexed*") is true in substance and matter of fact.

JAMES LONG.

Subscribed and sworn to before me }
this — day of —, A. D. 18—. }

GEORGE BROPHY, Circuit Clerk.

FORM OF REPLICATION TO A PLEA OF MISNOMER.

State of Illinois, }
——— County. } ss.

IN CIRCUIT COURT.

To — Term, A. D. 18—.

The People of the }
State of Illinois }
vs. }
George Long. }

And hereupon J. P. state's attorney for the said county, who prosecutes for the said People of the State of Illinois in this behalf says, that the said indictment, by reason of anything by the said James Long in his said plea above alleged, ought not to be quashed, because he says that the said James Long, long before and at the time of the preferring of the said indictment, was and still is known as well by the name of George Long as by the name of James Long, *to wit.*, at the town aforesaid, in the county aforesaid, and this, the said J. P. prays may be inquired of by the country etc.

J. P., State's Attorney.

§ 849. Procedure where a Plea of Misnomer has been Plead.—If a plea of misnomer be put in, the usual course is to reindict the defendant by the new name without prosecuting the old indictment further.¹ The prosecutor may, however, if he think fit, deny the plea, or reply that the defendant is known as well by one Christian name or surname as another, and if he succeed, judgment will be given for the people,² or the prosecutor may demur to the plea, and in cases of felony the demurrer and joinder may be *ore tenus*.³ It is not a good replication that the defendant is the same person mentioned

in the cause and the affidavit are written on the same piece of paper, and the paper shows upon its face to what suit it belongs. *Cook v. Yarwood*, 41 Ills., 115.

¹ 2 Hale P. C., 176; 1 Whart. Cr. L., § 537.

² 2 Leach, 476; 2 Hale, 237; *Lewis v. State*, 1 Head, 329; *State v. Dresser*, 54 Me., 569; *Schram v. People*, 29 Ills., 164; *Rockwell v. State*, 12 Ohio S., 427.

³ *Foster*, 105; 1 Leach, 476; 1 Whart. Cr. L., § 537.

in the indictment.¹ The court has no power upon a plea of misnomer to amend the indictment by changing the name so as to make it conform to the plea.²

§ 850. **Evidence.**—On the trial of an issue of fact made by a plea in abatement of misnomer, the fact that to an indictment by the same name the defendant had pleaded not guilty, is proper for the consideration of the jury;³ but the opinion of a witness acquainted with the writer's hand, not an expert, cannot be received as evidence that a letter made as a "v" in the indictment was intended for an "r," although the writer usually made "r" like other persons.⁴ Where the indictment charged the defendant by the name of O. Alonzo Rockwell, and the plea in abatement alleged the true name was Orville A. Rockwell, and the replication was that he was known by the name of O. Alonzo Rockwell, it was held that the replication was not sustained by proof that the defendant usually signed his name O. A. Rockwell, and was generally called O. A. Rockwell, and that certain of his friends called him Alonzo.⁵

§ 851. **Judgment—Answering Over.**—When an issue of fact upon a plea in abatement to an indictment for a misdemeanor is determined in favor of the people, the judgment is final and the defendant cannot plead over to the matter of the charge;⁶ but in cases of felony, if such issue is found for the people, the judgment is that the defendant plead over to the felony.⁷ But in all cases if judgment be given against the defendant, either on demurrer to his plea in abatement or on

¹ *Com. v. Dockman*, *Tatch*, C. C., 238.

² *McQuinn v. State*, 35 *Missis.*, 366.

³ *State v. Homer*, 40 *Me.*, 438.

⁴ *Sayers v. State*, 30 *Ala.*, 15.

⁵ *Rockwell v. State*, 12 *Ohio*, 427.

⁶ 1 *Chitty Cr. L.*, 447, 451; *R. v. Gibson*, 8 *East*, 107; *Schram v. People*, 29 *Ills.*, 164; *Smith v. State*, 28 *Missis.*, 729; *Miazza v. State*, 36 *Missis.*, 613; *Mineral Point R. R. Co. v. Keep*, 22 *Ills.*, 19; *Boggs v. Bindscott*, 23 *Ills.*, 58; *King v. Johnson*, 6 *East*, 583; *State v. Allen*, 1 *Ala.*, 442; *Guess v. State*, 1 *Engl. Ark.*, 147; *Brown v. Illinois C. R. R. Co.*, 42 *Ills.*, 366; *Goggin v. O'Donnell*, 62 *Ills.*, 66; *contra*, *U. S. v. Williams*, 1 *Dillon*, 485.

⁷ 1 *Chitty Cr. L.*, 447, 451; *U. S. v. Williams*, 1 *Dillon*, 485.

demurrer to the prosecutor's replication to such plea, the judgment is that the defendant answer over and is not final.¹ If a plea in abatement be pleaded by one of several defendants and allowed, it will only quash the indictment as to him without affecting it as to those who are correctly indicted.² When a plea in abatement upon an issue of law or fact is found for the defendant, the judgment is that the indictment be quashed;³ but the judgment is no bar to another indictment for the same offense.⁴

4. PLEAS IN BAR OF THE INDICTMENT.

§ 852. Defendant may Plead Several Pleas at the Same Time.—At common law, according to some of the authorities, the defendant in cases of a misdemeanor was not permitted to plead double—as by connecting, even in separate pleas, *autrefois convict* or *autrefois acquit* with not guilty,⁵ while in cases of felony and treason the defendant was allowed to add after the plea of *autrefois acquit* or *autrefois convict*⁶ or misnomer or other plea in abatement⁷ a plea of not guilty; but under our statute the defendant may in all cases, includ-

¹ 1 Chitty Cr. L., 451; R. v. Duffey, 4 Cox C. C., 190; R. v. Johnson, 6 East, 583; 1 Bennett & Hurd Lead. C., 340; McKinstry v. Pennoyer, 1 Scam., 319; 3 Scam., 201; Brawdshaw v. Morehouse, 1 Gilm., 395; Bramgan v. Rose, 3 Gilm., 129; Smith v. Harris, 12 Ills., 466; Smith v. State, 28 Missis., 728; McGuire v. State, 35 Missis., 366; Buzzard v. State, 20 Ark., 106; State v. Allen, 1 Ala., 445.

² Chitty Cr. L., 450; 1 Arch. C. P. & Pl., 360.

³ 1 Chitty Cr. L., 450; Rawl v. State, 8 Sm. & M., 599; 1 Arch. C. P. & Pl., 359; 2 Hale P. C., 238; 10 East, 88.

⁴ 1 Chitty Cr. L., 450; Com. v. Farrell, 105 Mass., 189.

⁵ Reg. v. Charlesworth, 1 Bist. & S., 460; Hill v. State, 2 Yerg., 248; Com. v. Merrill, 8 Allen, 545; Com. v. Goddard, 13 Mass., 455; 9 Cox C. C., 40; Reg. v. Strahn, 7 Cox C. C., 85; Reg. v. Skein, 8 Cox C. C., 143; State v. Copeland, 2 Swan, 626; Com. v. Bakeman, 105 Mass., 58; *contra*, Dominick v. State, 4 Ala., 680.

⁶ 1 Arch. C. P. & Pl., 89; 1 Bish. Cr. P., § 811; Rex v. Vandercomb, 2 Leach, 4th Ed., 708, 712; *contra*, Hill v. State, 2 Yerg., 248; State v. Copeland, 2 Swan Tenn., 626.

⁷ 1 Chitty Cr. L., 447; 1 Bish. Cr. P., § 811.

ing misdemeanors, plead as many matters of fact in several pleas as he may deem necessary for his defense.¹

FORM OF PLEA OF NOT GUILTY.

State of Illinois, }
 ——— County. } ss.

IN CIRCUIT COURT.

To ——— Term, A. D. 18—.

C. D.

ads.

The People of the
 State of Illinois, }

And the said C. D. in his proper person comes into court here, and having heard the said indictment read, says that he is not guilty of the felony (or "*misdemeanor*" or "*crime*"), therein charged against him, and hereof he puts himself upon the county.

C. D., Defendant.

Joinder of Issue.—And here upon comes J. P., state's attorney, of said county, who prosecutes for the people in this behalf and does the like.

J. P., State's Attorney.

§ 853. What may be Proved Under a Plea of Not Guilty. — Under the plea of not guilty the defendant may prove any fact tending to show that any material allegation in the indictment is not true,² and also any special matter of excuse, justification or defense, as insanity or the like, showing that he never was guilty of the offense charged.³ Therefore a person indicted for selling intoxicating liquor without a license may prove under the plea of not guilty, that he had a license without pleading such fact as a special defense.⁴ There is no way of taking advantage of a former conviction or acquittal, except by a special plea.⁵

§ 854. Plea of Not Guilty may be Withdrawn. — The plea of not guilty may, under proper circumstances, be withdrawn by

¹ R. S., 778, § 29.

² 1 Bish. Cr. P., § 799; 1 Chitty Cr. L., 474.

³ 1 Stark. Cr. Pl., 339; *Rex v. Pemberton*, 1 W. Bl., 230; *Rex v. Banks*, 1 Esp., 144; *Bennett v. State*, 1 Swan Tenn., 411; *Eggleston v. State*, 6 Blackf., 436; *Uterburg v. State*, 8 Blackf., 202.

⁴ *Peters v. State*, 3 Greene, Iowa, 74; *State v. Howard*, 2 Brev., 165.

⁵ 1 Bish. Cr. P., § 813; *State v. Barnes*, 32 Me., 530; *Com. v. Merrill*, 8 Allen, 545; *Com. v. Chesley*, 107 Mass., 224.

leave of the court, preparatory to entering the plea of guilty or to some other proceeding.¹

FORM OF PLEA OF AUTREFOIS CONVICT.

State of Illinois, } ss.
 _____ County. }

IN CIRCUIT COURT.

To — Term, A. D. 18—

C. D. }
 ads. }
 The People of the }
 State of Illinois. }

And the said C. D. in his own proper person comes into court here, and having heard the said indictment read, says that the said people ought not further to prosecute the said indictment against the said C. D., in respect to the offense in the said indictment mentioned, because he says that heretofore, *to wit.*, at the circuit court, begun and held at, etc. (*set forth the former judgment and conviction verbatim, and then proceed as follows:*) as by the record thereof in said court remaining more fully and at large appears; which said judgment and conviction still remain in full force and effect, and not in the least reversed or made void. And the said C. D. further says that the said C. D. so indicted and convicted are one and the same person and not other or different persons and that the (*felony and larceny*) of which he the said C. D. was indicted and convicted as aforesaid, and the (*felony and larceny*) of which he is now indicted are one and the same (*felony and larceny*) and not other and different (*felonies and larcenies*). And this the said C. D. is ready to verify; wherefore he prays judgment if the said people ought further to prosecute the said indictment against the said C. D., in respect of the said offense in the said indictment mentioned, and that the said C. D. may be dismissed and discharged from the same. C. D., Defendant.

FORM OF PLEA OF AUTREFOIS ACQUIT.²

State of Illinois, } ss.
 _____ County. }

IN CIRCUIT COURT.

To — Term, A. D. 18—.

C. D. }
 ads. }
 The People of the }
 State of Illinois. }

And the said C. D. in his own proper person comes into court here,

¹ *Rex v. Knightly*, Holt, 398; *State v. Abrahams*, 6 Iowa, 117; *Davis v. State*, 2 Ga., 674; *Ward v. People*, 3 Hill, 395; *Morton v. People*, 47 Ills., 468; *contra*, *Rex v. Barrett*, 2 Lewin, 264.

² For a form of a plea held to be sufficient, where the attorney for the state stopped the trial because the testimony failed, see *State v. Callendine*, 8 Iowa, 289.

and having heard the said indictment read, says that the said people ought not further to prosecute the said indictment against the said C. D.; because he says that heretofore, *to wit.*, at a circuit court, held at ———, in said county of, etc. (*so continuing the caption of the former indictment*) upon their oaths presented that the said C. D. (*continuing the indictment to the end in the past tense. Recite also the remainder of the record to the end of the judgment in the past tense in like manner. Then proceed thus :*) as by the record thereof more fully and at large appears; which judgment still remains in full force and effect, and not in the least reversed or made void. And the said C. D. in fact says, that the said C. D. and the said C. D. so indicted and acquitted as last aforesaid, are one and the same person, and not other and different persons, and that the (*felony and larceny*) of which he, the said C. D., was so indicted and acquitted as aforesaid, and the (*felony and larceny*) of which he is now indicted are one and the same (*felony and larceny*), and not other and different (*felonies and larcenies*). And this he the said C. D. is ready to verify; wherefore he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the present indictment specified.

C. D., Defendant

§ 855. **Requisites of a Plea of Former Conviction or Acquittal.**—The plea of a former conviction or acquittal must set out the record of the former conviction or acquittal, including the caption and indictment; and allege that the two offenses are the same,¹ and that the defendant in the former suit is the same person who is defendant in the latter,² and must set forth facts sufficient to show that the tribunal passing upon the issue at the former trial had jurisdiction, and the conviction or acquittal was lawful and proceeded on the merits.³ If one person is indicted singly he may plead that he was before indicted jointly with other persons and on such indictment convicted or acquitted.⁴

§ 856. **Pardon.**—Formerly if a pardon had been granted to

¹ *McQuoid v. People*, 3 Gilm., 76; *Com. v. Sutherland*, 109 Mass., 342; *Com. v. Chesley*, 107 Mass., 225.

² *Rex v. Wildey*, 1 M. & S., 183; *Rex v. Vandercomb*, 2 East P. C., 519, 2 Leach, 708; *State v. Atkinson*, 9 Humph., 677; *Henry v. State*, 33 Ala., 389; *Rex v. Taylor*, 5 Dowl. & Ry., 422, 3 B. & Cres., 502; *Foster v. State*, 39 Ala., 229.

³ *State v. Spencer*, 10 Humph., 431, 436; *State v. Hodgkins*, 42 N. H., 474; *State v. Salge*, 2 Nev., 321; *State v. Knouse*, 33 Iowa, 365.

⁴ *Rex v. Dann*, 1 Moody, 424.

the defendant for the offense of which he was indicted he could plead it in bar of the indictment;¹ but in the State of Illinois the governor has no power to grant pardons until after the accused has been convicted of the offense;² therefore under our constitution a pardon is not a defense to an indictment.

§ 857. *Statute of Limitations.*—In civil cases it seems to be necessary to plead the statute of limitations in order to make it available as a defense,³ and it is presumed that in this state the same rule will be applied to criminal cases,⁴ though there are some decisions elsewhere holding that the defendant may avail himself of this defense without specially pleading it.⁵ If the indictment charges the offense to have been committed so long before the finding as to render it apparently barred by the statute in this state it will probably be held sufficient, though it does not contain an allegation bringing the case within any exception in the statute.⁶

FORM OF PLEA OF STATUTE OF LIMITATIONS.

State of Illinois, }
 ——— County. } ss.

IN CIRCUIT COURT.

To — Term, A. D. 18—.

C. D. ads. The People of the State of Illinois.	}	And the said C. D. in his proper person comes into court here, and having heard the said indictment
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¹ Arch. C. P. & Pl., 374.

² R. S., 67, § 12, Const. Ills., Art. V., § 13.

³ *Wilson v. Van Winkle*, 2 Gilm., 684; *School Trustees v. Wright*, 12 Ills., 441; *Burknap v. Wight*, 14 Ills., 303; *Gebhart v. Adams*, 23 Ills., 397; *Peck v. Cheny*, 4 Wis., 249.

⁴ *Com. v. Hutchinson*, 2 Parsons R., 453; *State v. Hussey*, 7 Iowa, 409; *State v. Groome*, 10 Iowa, 309.

⁵ *State v. Robinson*, 9 Foster, 274; *McLean v. State*, 4 Ga., 335; *U. S. v. Watkins*, 3 Cranch C. C., 441; *U. S. v. White*, 5 Cranch Cr. C., 73; *Hubbard v. State*, 7 Ind., 160; *State v. Hussey*, 7 Iowa, 409.

⁶ 1 Bish. Cr. P., § 405; *Gebhart v. Adams*, 23 Ills., 399; *Burknap v. Wight*, 14 Ills., 303; *People v. Santwood*, 9 Cowen, 655; *U. S. v. White*, 5 Cranch Cr. C., 73; *Com. v. Hutchinson*, 2 Parsons R., 453; *contra. McLane v. State*, 4 Ga., 335; *State v. Robinson*, 9 Foster, 274; *U. S. v. Watkins*, 3 Cranch Cr. C., 441; *People v. Miller*, 12 Cal., 291; *Hatwood v. State*, 18 Ind., 492; *Serpentine v. State*, 1 How. Missis., 256.

read, says that he was not guilty of the said several supposed felonies (*or "misdemeanors"*) therein charged against him, or of any or either of them at any time within three years (*or one year and six months*) next, before the finding of the said indictment against him. And this he the said C. D. is ready to verify; wherefore, he prays judgment, and that by the court here he may be dismissed and discharged from the said premises in the said indictment specified.

C. D., Defendant.

SECTION VI.

PROCEEDINGS BEFORE TRIAL.

- § 858. Causes for a Change of Venue.
- 859. To what Court the Change of Venue will be Made.
- 860. Petition for a Change of Venue.
- 861. When Cause Prejudice of Judge.
- 862. When Cause Prejudice of Inhabitants
- 863. When Application may be Made.
- 864. Not after First Term, Unless, etc.
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- 866. Notice.
- 867. When a Change of Venue must be Granted.
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- 870. Only one Change.
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- 872. Transmitting Papers, etc.
- 873. Filing Transcripts, etc.—Docketing Cause, etc.
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- 875. Transferring Person.
- 876. Parties and Witnesses to Attend Trial.
- 877. Recognizing Witnesses.
- 878. Costs.
- 879. Irregularities Waived.
- 880. Subpœnaes.
- 881. The Right of the Accused to have the Witnesses Present on the Trial.
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- 883. Testimony on a Former Trial—Depositions before Magistrates, etc.
- 884. Receiving Depositions, etc., in Evidence, when not a Violation of the Constitution.

§ 885. Dying Declarations.

886. What Essential to the Admissibility of Dying Declarations.

887. Husband and Wife.

888. Admissibility of Dying Declarations to be Determined by the Court.

889. Substance of Dying Declarations, Testimony and Depositions Admissible.

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891. Diligence Required to Obtain.

892. Facts to be Proved must be Material—How Stated—Character.

893. Amendment of Affidavit for a Continuance.

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897. Effect of Admitting the Truth of the Facts Stated in the Affidavit.

898. When Error to Refuse to Grant a Continuance.

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900. Setting Aside Order for a Continuance.

1. CHANGE OF VENUE.

§ 858. Causes.—The statute provides that “when any defendant in an indictment or information in any court in this state shall fear that he will not receive a fair and impartial trial in the court in which the case is pending, because the judge of the court is, or the inhabitants of the county in which the case is pending are, prejudiced against him, the court shall award a change of venue upon the application of the defendant as hereinafter provided.¹

§ 859. To what Court.—“When a change of venue is granted it may be to some other court of record, of competent jurisdiction in the same county, or in some other convenient county² to which there is no valid objection; *provided*, that when the case is pending in the criminal court of Cook County, and the cause for the change applies only to a judge of said court, holding the court at the time of trial, the case

¹ R. S., 1095, § 18.

² Under a former statute it was held that a change of venue must be taken to the nearest county. *Baxter v. People*, 2 Gilm., 578; but the language of the statute is now changed so that this rule no longer prevails.

may be tried by any other of the judges of said court to whom the cause alleged does not apply."¹

§ 860. *Petition.*—"Every application for a change of venue shall be by petition, setting forth the cause of the application and praying a change of venue, which petition shall be verified by the affidavit of the defendant."²

§ 861. *When Cause Prejudice of Judge.*—"When the cause for a change of venue is the prejudice of the judge, the petition shall be accompanied by the affidavits of at least two reputable persons, resident of the county, and not of kin or counsel to the applicant, that they believe that the judge is so prejudiced against the applicant that he cannot have a fair and impartial trial; and thereupon the said judge shall change the venue of the said cause."³

FORM OF PETITION FOR CHANGE OF VENUE ON ACCOUNT OF THE PREJUDICE
OF THE JUDGE.

State of Illinois, }
—— County. } ss.

IN CIRCUIT COURT.

To —— Term, A. D. 18—.

C. D. }
ats. }
The People of the }
State of Illinois. } Larceny.

The petitioner C. D., defendant in the above entitled cause, respectfully represents to the judge of the said court that he fears that he will not receive a fair and impartial trial in the above entitled cause in this court, because the judge thereof is prejudiced against him;⁴ that a knowledge of such prejudice did not come to petitioner until this day; and that E. F. and G. H. making the annexed and accompanying affidavit are reputable persons. Petitioner therefore prays for a change of venue in this cause pursuant to the statute in such case made and provided.

C. D.

State of Illinois, }
—— County. } ss.

C. D., the above-named petitioner, being duly sworn, on his oath states that the foregoing petition is true in substance and matter of fact.

C. D.

Subscribed and sworn to before me }
this —— day of ——, A. D. 18—. }
——, Clerk.

¹ R. S., 1095, § 19; *Curran v. Beach*, 20 Ills., 260.

² R. S., 1095, § 20.

³ *Id.*, § 21.

⁴ *McGoon v. Little*, 2 Gilm., 42; *Barrows v. People*, 11 Ills., 121; *Walsh v. Ray*, 38 Ills., 30.

FORM OF AFFIDAVIT TO ACCOMPANY PETITION.

State of Illinois, }
 ——— County. } ss.

IN CIRCUIT COURT.

To ——— Term, A. D. 18—.

C. D. }
 ats. }
 The People of the }
 State of Illinois. } Larceny.

E. F. and G. H.,¹ being each duly sworn, each for himself on his oath severally says, that he is a resident of the said county, and not of kin or counsel to C. D. mentioned in the foregoing (or “*annexed*”) petition; and that he believes that the Hon. ———, the judge of the said court referred to in the said petition, is so prejudiced against the said C. D., that he cannot have a fair and impartial trial in the above entitled cause referred to in said petition.

Subscribed and sworn to before me }
 this ——— day of ———, A. D. 18—. }
 W. T. B., Clerk.

E. F.
 G. H.

§ 862. When Cause Prejudice of Inhabitants.—“When the cause for the change of venue is the prejudice of the inhabitants of the county, against the defendant, his petition shall set forth the facts on which he founds his belief, and the attorney, on behalf of the people, may deny the facts stated in the petition, and support his denial by counter affidavits, and the judge may grant or deny the petition as shall appear to be according to the right of the case.”²

FORM OF PETITION FOR A CHANGE OF VENUE BECAUSE THE INHABITANTS OF THE COUNTY ARE PREJUDICED AGAINST THE DEFENDANT.

State of Illinois, }
 ——— County. } ss.

IN CIRCUIT COURT.

To ——— Term, A. D. 18—.

C. D. }
 ads. }
 The People of the }
 State of Illinois. } C. D., the defendant in the above entitled case, respectfully represents to the judge of the said court, that he fears and verily believes that he will not receive a fair and impartial trial in this court in the above entitled case, because the inhabitants of

¹ Probably the court will presume that the persons making the affidavit are reputable, unless the contrary is shown, though it may be safer to state such fact in the petition until the question shall be judicially settled.

² R. R., 1095, § 22. For the construction of the statute of Iowa, see *State v. Nash*, 7 Iowa, 347.

said ——— county, in which the said case is pending, are prejudiced against him; that he founds his belief as to such prejudice on the following facts, *to wit.*;

1. That, etc. (*insert the facts on which the belief is founded*); and that petitioner did not ascertain the existence of such prejudice until within the last — days. Petitioner therefore prays for a change of venue in this case, in pursuance of the statute in such case made and provided.

C. D.

State of Illinois, }
 ——— County. } ss. C. D., the above-named petitioner, being duly sworn, on his oath says, that the foregoing petition is true in substance and matter of fact.

C. D.

Subscribed and sworn before me }
 this — day of —, A. D. 18—. }
 G. B., Clerk.

§ 863. **When Application may be Made.**—"The application may be made to the court in which the case is pending in term time or to the judge thereof in vacation, reasonable notice of the application having been given to the state's attorney."¹

§ 864. **Not After First Term Unless, etc.**—"No application for a change of venue made after the first term shall be allowed unless the applicant shall have given to the state's attorney at least ten days' previous notice of his intention to make such application, except where the causes have arisen or come to the knowledge of the applicant within less than ten days before the making of the application."²

§ 865. **Further Exception.**—"No change of venue shall be granted after the first term at which the applicant might have been heard, unless he shall show that the causes for which a change is asked have arisen or come to his knowledge since the term at which the application might have been made."³

§ 866. **Notice.**—"An application for a change of venue must be denied, unless notice of the motion therefor has been given

¹ R. S., 1095, § 23.

² Id., 1096, § 24; *Gilson v. Powers*, 16 Ills., 357.

³ R. S., 1096, § 25.

or waived.¹ And such notice must be given at the earliest period. If the cause is known in vacation, notice should be given and the application should be made to the judge at chambers.² Where the petition states that "the causes rendering a change necessary came to the knowledge of the petitioners within less than ten days past," one day's notice of the application for a change of venue was held not to be sufficient.³ The statute requires the notice to be reasonable⁴ and the length of time necessary to constitute a reasonable notice, will in some degree depend upon the peculiar circumstances of each particular case, and must necessarily be left to the legal discretion of the judge or court to which the application is made.⁵

§ 867. **When Must be Granted.**—When the application for a change of venue is made because the judge is prejudiced and the prisoner has shown a clear right to such change of venue, it is error to deny it, and in such a case all subsequent proceedings of trial and conviction will be set aside and the cause remanded and the prisoner placed in *statu quo*,⁶ but where such application is made because the inhabitants of the county are prejudiced against the defendant under the present statute the judge may grant or deny the petition according to the right of the case.⁷ When the reasons for a change of venue cease to exist, the necessity and the right to change

¹ Hunt v. Tinkham, 21 Ills., 639; Moore v. Ellsworth, 51 Ills., 308; Marble v. Bonhotel, 35 Ills., 240; Graves v. Shoeffelt, 60 Ills., 462; Preston v. Winter, 20 Iowa, 264.

² Moss v. Johnson, 22 Ills., 333; Kelley v. Downs, 29 Ills., 74; and see Dean v. White, 5 Iowa, 266.

³ Kelley v. Downs, 29 Ills., 74.

⁴ R. S., 1095, § 23.

⁵ Berry v. Wilkinson, 1 Scam., 164; Kelley v. Downs, 29 Ills., 74.

⁶ Barrows v. People, 11 Ills., 121; McGoon v. Little, 2 Gilm., 42; Pertcet v. People, 65 Ills., 230; Freleigh v. State, 8 Mo., 611; Clark v. People, 1 Scam., 120; Walsh v. Ray, 38 Ills., 30; Rafferty v. People, 66 Ills., 118; Cass v. State, 2 Greene Iowa, 353; Welsh v. Savery, 4 Iowa, 241; Brener v. Frazier, 8 Iowa, 77.

⁷ R. S., 1095, § 22; Gray v. People, 26 Ills., 345; State v. Mooney, 10 Iowa, 507; State v. Arnold, 12 Iowa, 480; State v. Ingalls, 17 Iowa, 8; State v. Baldy, 17 Iowa, 39; State v. Ostrander, 18 Iowa, 447; State v. Wright, 19

also cease.¹ It has been held to be a safe and judicious practice where a change is asked because of the prejudice of the inhabitants of the county against the defendant to require a plea to be entered before the change of venue is awarded.² In making an order for a change of venue the court has no authority to impose any terms upon the party applying for the same, such as the payment of costs.³

§ 868. **Supplementary Affidavits.**—On an application for a change of venue it is within the province of the court to determine whether anything beyond the petition shall be considered. Supplementary affidavits in aid of such petition need not be heard.⁴ If, however, the cause for the change of venue is the prejudice of the inhabitants of the county against the defendant, the attorney on behalf of the people may deny the facts stated in the petition and support his denial by counter affidavits.⁵

§ 869. **By Consent.**—A change of venue may be awarded in a criminal case by consent, without requiring a petition or affidavit to be filed for that purpose.⁶

§ 870. **Only One Change.**—“No more than one change of venue shall be granted to the same defendant.”⁷

§ 871. **When Change Granted in Vacation.**—“When a change of venue is granted in vacation, the judge granting it shall immediately transmit the petition and affidavits and his order directing the change of venue to the clerk of the court, who shall file the same in his office and make an entry of such order on the records of the court.”⁸

Iowa, 94; *State v. Hutchinson*, 27 Iowa, 212; *State v. Freeman*, 27 Iowa, 333; *State v. Collins*, 32 Iowa, 42; *State v. Felter*, 32 Iowa, 49.

¹ *Myers v. Walker*, 31 Ills., 353.

² *Gardiner v. People*, 3 Scam., 88; *Gilson v. Powers*, 16 Ills., 355.

³ *Bellingall v. Duncan*, 2 Gilm., 591.

⁴ *Kelley v. Downs*, 29 Ills., 74.

⁵ R. S., 1095, § 22.

⁶ *People v. Scates*, 3 Scam., 351; *Brennan v. People*, 15 Ills., 511; *Pierson v. Finley*, 37 Ills., 29; see also *Davidson v. Wheeler*, Morris Iowa, 238; *Johnson v. Von Kettler*, 66 Ills., 63.

⁷ R. S., 1096, § 26.

⁸ *Id.*, § 27.

§ 872. **Transmitting Papers, etc.** — “In all cases of change of venue, the clerk of the court from which the change is granted shall immediately make a full transcript of the record and proceedings in the case, and of the petition, affidavits and order for the change of venue, and transmit the same, together with all papers filed in the case, including the indictment and recognizances of defendant and all witnesses, to the proper court: *Provided*, that when the change is granted to a part but not all of several defendants, a certified copy of the indictment or information, and of the other papers in the case, shall be transmitted to the court to which the change of venue is ordered, and such certified copies shall stand as the originals. Such transcript and papers may be transmitted by mail or in such other way as the court or judge may direct.”¹

§ 873. **Filing Transcripts, etc. — Docketing Cause, etc.** — “The clerk of the court to which the venue is changed shall file the transcript and papers transmitted to him, and docket the case; and such case shall be proceeded in and determined in all things, as well before as after judgment, as if it had originated in such court.”²

§ 874. **Effect of Omission to Transmit a Proper Transcript of the Record.** — Where the clerk omits to send a correct transcript of the record and proceedings in the case, and the petition with the proper papers to the court to which the change of venue is taken, it is the duty of the court on application of the state’s attorney, to grant a rule on the clerk to certify and transmit the proper papers, and stay the proceedings until the rule can be complied with; and if a motion is made to dismiss the case wherein the venue has been changed, because the proper papers have not been transmitted, the case will be dismissed unless a cross motion be interposed for a rule upon

¹ R. S., 1096, § 28. The amendment of the certificate by the clerk of the county, from which the change was taken after the papers had been filed in the other county, was held not to be error. *State v. Gibson*, 29 Iowa, 295.

² R. S., 1096, § 29. It is not erroneous after a change of venue upon a conviction for a capital crime, for the court to order that the prisoner remain in the jail of the county where he was tried until the time of the execution of the sentence of death. *Jackson v. People*, 18 Ill., 272.

the clerk to certify and transmit the papers.¹ An indictment certified from one county to another, must contain the names of all the persons indicted. So where an indictment was found against seven persons for a riot, and the one certified contained the names of six only, it was held that no judgment could be rendered against the six convicted;² for the state's attorney should have applied to the court for a stay of proceedings until a correct copy of the indictment could be had. Application for a rule upon the clerk to send the proper papers, should be made at the first term after the change.³

§ 875. **Transferring Person.** — "When the applicant is in custody or confined in jail, the court or judge shall make an order to the sheriff or other officer having custody of the applicant, to remove his body to the common jail of the county to which the venue is changed, and there deliver him to the keeper of the said jail, together with the warrant by virtue of which he is confined or held in custody, not more than three days next before the first day of the term of said court; and the sheriff shall obey such order, and shall indorse on such warrant of commitment the reason of the change of custody, and shall deliver such warrant with the body of the prisoner to the keeper of the jail of the proper county, who shall receive the same and give to the sheriff a receipt therefor, and shall take charge of and keep the prisoner in the same manner as if he had originally been committed to his custody."⁴

§ 876. **Parties and Witnesses to Attend Trial.** — "When the venue shall be changed in any criminal case, the parties and witnesses, and all others who may have entered recognizances, to attend a trial of such cause, having notice of the change of venue, must attend at the time and place at which the trial is to be had according to such change, and a failure to do so shall work a forfeiture of the recognizance."⁵

¹ *Wight v. Kirpatrick*, 4 Scam., 340.

² *Smith v. People*, 36 Ills., 290.

³ *Granger v. Warrington*, 3 Gilm., 299.

⁴ R. S., 1096, § 30; *Jackson v. People*, 18 Ills., 272.

⁵ R. S., 1096, § 31. Where a change of venue is granted in a criminal case, the court granting the order for the change may take a recognizance

§ 877. **Recognizing Witnesses.** — “When the venue is changed in term time, the state’s attorney shall have all of the witnesses on the part of the prosecution recognized, to appear at the court to which the change is ordered, on the first day of the term at which the trial is to be had.”¹

§ 878. **Costs.** — “Upon the termination of any trial when a change of venue has been obtained, the clerk of the court in which the trial is had shall make out a statement, and certify to the same of the costs, to the county in which the trial is had for the fees and board of the jury, and of boarding the prisoner while in jail of such county; and such account, when so certified, shall be paid by the county in which such indictment or information was found; and all fines imposed and collected in the county where the trial is had shall be paid over to the county in which the indictment or information was found.”²

§ 879. **Irregularities Waived.** — “All questions concerning the regularity of proceedings in obtaining changes of venue, and the right of the court to which the change is made to try the cause and execute the judgment, shall be considered as waived after trial and verdict.”³ If the party fails to make his objections in the court below, he cannot make them in the Supreme Court.⁴ Where the defendant moved to strike a cause from the docket of the court to which the venue had been changed for irregularities in the certificate of the clerk of the court in which the action originated after having appeared at a previous term of such court and excepted to the ruling of the court in suppressing a deposition and made a motion for and obtained a continuance, it was held that his appearance at the preceding term and the steps taken by him in the cause were

from the defendant to appear in the court to which the venue is changed. *Stebbins v. People*, 27 Ills., 241.

¹ R. S., 1096, § 32.

² *Id.*, 1097, § 33; *County of Rock Island v. County of Mercer*, 24 Ills., 36.

³ R. S., 1097, § 35; *McBain v. Enloe*, 13 Ills., 79; *Johnson v. Von Kettler*, 66 Ills., 63.

⁴ *Gardiner v. People*, 3 Scam., 83; *Hitt v. Allen*, 13 Ills., 592; *Brennan v. People*, 15 Ills., 515.

a waiver of any irregularities there might have been in the clerk's certificate. Where a change of venue is improperly granted, the proper practice for the party complaining is to move to remand the cause to the county from which it was sent, and if the motion is overruled, take an exception and embody the motion and ruling of the court in a bill of exceptions.²

2. PROCURING THE EVIDENCE.

§ 880. *Subpœnas*.—"The statute provides that it shall be the duty of the clerk of the court to issue subpœnas, either on the part of the people or of the accused, directed to the sheriff, coroner, or any constable of any county of this state. And every witness who shall be duly subpœnaed, and shall neglect or refuse to attend any court pursuant to the requisitions of such subpœna, shall be proceeded against and punished for contempt of the court. And attachment against witnesses who live in a different county from that where such subpœna is returnable, may be served in the same manner as *capiases*, are directed to be served out of the county from which they issue."³

§ 881. *Witnesses to be Present*—According to the rules of evidence of the common law by statute made binding upon courts and juries in this state,⁴ and the provisions of the constitution of this state,⁵ on the trial of a prisoner accused of any crime whatever he has a right to have the witnesses against him produced in open court, and to meet them face

¹ *Flagg v. Roberts*, 67 Ills., 485.

² *Johnson v. Von Kettler*, 66 Ills., 63; but see *People v. Scates*, 3 Scam., 354.

³ R. S., 410, § 427. It has been said that a subpœna cannot issue in behalf of the prisoner until after an indictment found; for before this there is no cause in court. 1 Arch. C. P. & Pl., 571; *State v. Evans*, 1 Tenn., 215; *U. S. v. Moore*, Wallace, 25; 1 Burrs Tr. by Robertson, 177. The defendant in a criminal case has no right by virtue of the provision of the constitution, R. S., 60, Const. Art., II, § 9, to demand the personal attendance of a convict to testify as a witness on the trial, *State v. Kennedy*, 20 Iowa, 372.

⁴ R. S., 410, § 428.

⁵ *Id.*, 60; Const. of Ills., Art. II, § 9.

to face so that he may have an opportunity given him to cross-examine them there.¹ Therefore the deposition of a witness taken in the absence of the prisoner, or when no opportunity is given him to cross-examine the witness² or taken on his examination before the magistrate for the same offense in his presence, though the witness is beyond the jurisdiction of the court by the procurement of the defendant³ is not admissible against the prisoner unless by his express consent.⁴

§ 882. **Depositions—Notarial Certificate of Protest.**—In cases of misdemeanors the deposition of absent witnesses may be taken by consent;⁵ and if the attendance of material witnesses for the defendant cannot be procured, he may offer to join in a commission to take their depositions, and the court may in its discretion continue the cause from term to term until the other party will join; and when both have joined, the cause will be continued until the next term.⁶ A notarial certificate of protest is not evidence in a criminal case, for the notary must be called.⁷

§ 883. **Testimony on a Former Trial—Depositions Before Magistrates, etc.**—Where a witness has testified on a former trial of the same cause, or where the same matter was in issue between the same parties and the witness has since died, what

¹ 1 Bish. Cr. P., § 1090; 1 Chitty Cr. L., 585; *Com. v. Ricketson*, 5 Met., 412; *People v. Restell*, 3 Hill, 289; *Goodman v. State*, 1 Meigs, 195; *State v. Collins*, 32 Iowa, 40; *Summons v. State*, 5 Ohio, N. S., 325; *State v. Reidel*, 26 Iowa, 430.

² *Rex v. Paine*, 1 Salk., 281; *Rex v. Woodcock*, 1 Leach, 4th Ed., 561; *Pyke v. Crouch*, 1 Ld. Raym., 730; *Rex v. Dingler*, 2 Leach, 4th Ed., 561; *Rex v. Forbes*, Holt N. P., 599; *State v. Hill*, 2 Hill S. C., 607; *State v. Campbell*, 1 Rich., 124.

³ *Bergen v. People*, 17 Ills., 426; *contra*, *Rex v. Harrison*, 4 Harg. St. Tr., 487, 492; *Rex v. Morley J. Kel.*, 55; *State v. Houser*, 26 Mo., 431.

⁴ *State v. Polson*, 29 Iowa, 133.

⁵ 1 Roscoe Cr. Ev., 78; *Rex v. Marphew*, 2 M. & S., 602; *Richardson v. People*, 31 Ills., 173. In Iowa a deposition taken at the request of the accused was held to be admissible in evidence on the part of the state in a case of murder. *Nash v. State*, 2 Greene Iowa, 287.

⁶ 1 Chitty Cr. L., 612; *Mostyn v. Fabrigus*, Cowp., 174; *People v. Restell*, 3 Hill, 299; *Richardson v. People*, 31 Ills., 173.

⁷ *State v. Reidel*, 26 Iowa, 430.

such witness swore to on the former occasion may be given in evidence.¹ And if the statutes of 1 & 2 Phil. & M. Ch. 13, §§ 4, 5; and 2 & 3 Phil. & M. Ch. 10, are now in force in this state, according to numerous decisions, the deposition of a witness taken before a magistrate² or coroner,³ in a case of felony, may be read in evidence against the accused on his trial in case the person who made the deposition is dead, or so ill as to be unable to travel,⁴ or insane.⁵ But such evidence cannot be received if the witness is living, though he is beyond the jurisdiction of the court or cannot be found;⁶ nor if the accused was not present when the deposition was taken, or has not had an opportunity to cross-examine the witness;⁷ nor if the witness was not first sworn and then examined instead of being examined and statement taken without his being sworn and then being sworn to the truth of the statement;⁸ nor if the deposition was not taken in a proceeding authorized by law.⁹

§ 884. **Constitutional.**—The reception of the testimony of a witness given on a former trial, or on an examination before

¹ *Bergen v. People*, 17 Ills., 427; *Rex v. Buckworth*, 2 Keab, 403, T. Raym., 170; *People v. Newman*, 5 Hill, 295; *State v. Harmon*, 27 Mo., 120; *Kendrick v. State*, 10 Humph., 479; *Summons v. State*, 5 Ohio S., 325; U. S., v. Wood, 3 Wash. C. C., 440; *Com. v. Richards*, 18 Pick., 434; *Young v. Dearborn*, 2 Fost. N. H., 372; *contra*, *Finn v. Com.*, 5 Rand, 701; *Mendum v. Com.*, 6 Rand, 704; *Brogy v. Com.*, 10 Grat., 722.

² 1 Bish. Cr. P., § 1093; *Beebee v. People*, 5 Hill, 32; U. S. v. McComb, 5 McLean, 286; *State v. McO'Brien*, 24 Mo., 402; *State v. Baker*, 24 Mo., 437; *Barrow v. People*, 1 Com., 386.

³ 1 Bish. Cr. P., § 1094; *Rex v. Eriswell*, 3 T. R., 707; *Rex v. Purefoy*, *Peake Ev.*, 64; *Jervis Cor.*, 217, 218.

⁴ 2 Phil. Ev., 97; 1 Bish. Cr. P., § 1093; *Reg. v. Wilshaw*, C. & M., 145.

⁵ *Reg. v. Marshall*, C. & M., 147; *Rex v. Eriswell*, 3 T. R., 707.

⁶ J. Kel., 55; *Dupree v. State*, 33 Ala., 380; *People v. Newman*, 5 Hill, 295; *Finn v. Com.*, 5 Rand, 701, 708; *Young v. Dearborn*, 2 Fost. N. H., 372; *Brogy v. Com.*, 10 Grat., 722.

⁷ *State v. Hill*, 2 Hill S. C., 607; *State v. Campbell*, 1 Rich., 124; *People v. Restell*, 3 Hill, 300; *Bergen v. People*, 17 Ills., 426; *contra*, 1 Bish. Cr. P., § 1094; *Rex v. Purefoy*, *Peake Ev.*, 64.

⁸ *People v. Restell*, 3 Hill, 300; *Rex v. Kiddey*, 4 Dowl. & Ry., 734.

⁹ 1 Bish. Cr. P., § 1099. *People v. Restell*, 3 Hill, 300; *People v. Garret*, 6 Cal., 203.

a magistrate when the accused was present and had an opportunity to cross-examine the witness, is not a violation of constitutional provision securing to persons accused of a crime the right "to meet the witnesses face to face,"¹ for it is said the accused did meet the witness face to face in these cases, and might have cross-examined him touching the accusation.² So the reception of evidence of the dying declarations of a deceased person in relation to the injury of which he afterwards dies, made in the absence of the accused, has been held not to be a violation of this provision of the constitution.³

§ 885. **Dying Declarations** are such as are made by the party relating to the facts of the injury of which he afterwards dies, under the fixed belief and moral conviction that his death is impending and certain to follow almost immediately, without opportunity for repentance, and in the absence of all hope of avoidance; when he has despaired of life and looks to death as inevitable and at hand.⁴ These declarations are admissible in evidence only in cases of homicide where the death of the deceased is the subject of the charge and the circumstances of the death are the subject of the dying declarations,⁵ in which case they are admissible both for and against the party charged with the death.⁶

¹ R. S., 60, Const. Ills., Art. II., § 9.

² 1 Bish. Cr. P., § 1099; *Com. v. Richards*, 18 Pick., 434; *Summons v. State*, 5 Ohio S., 325; *contra*, *State v. Collins*, 32 Iowa, 40.

³ *Starkey v. People*, 17 Ills., 20; *Murphy v. People*, 37 Ills., 456; *Wood-sides v. State*, 2 How. Missis., 655; *Anthony v. State*, 1 Meigs, 265; *Campbell v. State*, 11 Ga., 355; *Robbins v. State*, 8 Ohio S. N. S., 131; *State v. Nash*, 7 Iowa, 347.

⁴ 1 Greenl. Ev., § 156; *Roscoe Cr. Ev.*, 27-35; 1 Arch. C. P. & Pl., 449; *Starkey v. People*, 17 Ills., 21; *Rex v. Woodcock*, 2 Leach Cr. Cas., 267; *State v. Nash*, 7 Iowa, 347; *State v. Johnson*, 8 Iowa, 525; *State v. Nettlebush*, 20 Iowa, 257.

⁵ 1 Whart. Cr. L., § 675; 1 Arch. C. P. & Pl., 449; 1 Greenl. Ev., § 156; *Rex v. Mead*, 2 B. & Cres., 605; *Nelson v. State*, 7 Humph., 542; *State v. Shelton*, 2 Jones Law, N. C., 360; *Rex v. Loyd*, 4 Car. & P., 233; *Rex v. Baker*, 2 M. & Rob., 53; *Lambert v. State*, 23 Missis., 323.

⁶ 1 Whart. Cr. L., § 669; *Rex v. Scaife*, 1 Moody & Rob., 551; *U. S. v. Taylor*, 4 Cranch C. C., 338; *Moore v. State*, 12 Ala., 764.

§ 886. **What Essential to the Admissibility of Dying Declarations.**—It is essential to the admissibility of these declarations and is a preliminary fact to be proved by the party offering them, that the party knew or thought he was in a dying state.¹ The declarations of the deceased must be excluded if he would not be a competent witness if offered as such on the trial,² or such declarations relate to things to which he would not have been competent to testify if sworn in the cause;³ therefore, if the declaration is merely an opinion, it is inadmissible.⁴ It is no objection to their admissibility that they were made in answer to leading questions, or obtained by pressing and earnest solicitation⁵ or made in a foreign language⁶ or by signs;⁷ or made in the absence of the accused without giving him an opportunity for cross-examination,⁸ or that they have been reduced to writing and sworn to by the deceased.⁹ But whatever the statement may be, it must be complete in itself; for if the declarations appear to have been intended by the dying

¹ 1 Whart Cr. L., §§ 671-674; 1 Arch. C. P. & Pl., 451; Roscoe Cr. Ev., 29; 1 Greenl. Ev., § 158; *State v. Gillick*, 7 Iowa, 288; *Com. v. Roberts*, 108 Mass., 296; *State v. Moody*, 2 Hayw., 31; *State v. Poll*, 1 Hawks, 442; *King v. Com.*, 2 Va., Cas., 81; *Rex v. Crockett*, 4 Car. & P., 544; *Gibson v. Com.*, 2 Va. Cas., 111, 116; *McDaniel v. State*, 8 Sm. & M., 401; *Lewis v. State*, 9 Sm. & M., 115; *Montgomery v. State*, 11 Ohio, 424; *Starkey v. People*, 17 Ills., 18; *Murphy v. People*, 37 Ills., 447; *Rex v. Haywood*, 6 Car. & P., 157; *Rex v. Fagent*, 7 Car. & P., 238; *People v. Knickerbocker*, 1 Park. Cr. R., 302; *People v. Green*, 1 Park. Cr. R., 11, 1 Denio, 614; *Moore v. State*, 12 Ala., 764; *People v. Robinson*, 2 Park. Cr. R., 235.

² 1 Arch. C. P. & Pl., 450, 455; 1 Greenl. Ev., § 157; *Rex v. Pike*, 3 Car. & P., 598; *Reg. v. Perkins*, 9 Car. & P., 395; *Rex v. Drummond*, 1 Leach Cr. Cas., 378.

³ 1 Greenl. Ev., § 159; *McPherson v. State*, 22 Ga., 478; *Johnson v. State*, 17 Ala., 618.

⁴ *State v. Arnold*, 13 Ired., 184.

⁵ *Rex v. Fagent*, 7 Car. & P., 238; *Com. v. Vass*, 3 Leigh, 786; *Rex v. Reason*, 1 Stra., 499; *Rex v. Woodcock*, 2 Leach Cr. Cas., 563.

⁶ *Starkey v. People*, 17 Ills., 18.

⁷ *Com. v. Casey*, 11 Cush., 417.

⁸ 1 Phil. Ev., 235; 2 Stark. Ev., 461; 1 Stark. Ev., 101; 1 Arch. C. P. & Pl., 454.

⁹ 1 Greenl. Ev., § 161; *State v. Arnold*, 13 Ired., 184; *Rex v. Reason*, 1 Stra., 500.

man to be connected with and qualified by other statements, which he is prevented by any cause from making, they will not be received.¹ Dying declarations are admissible, notwithstanding there may be other witnesses by whose testimony the same facts might be shown, which are sought to be established by dying declarations.²

§ 887. **Husband and Wife.** — On a trial for the murder of a wife by her husband, the declarations of the deceased made *in extremis* as to the cause of her death are competent against the husband.³ So the dying declarations of the husband are admissible under similar circumstances against the wife.⁴

§ 888. **Admissibility to be Determined by the Court.** — It is for the court in the first instance to determine upon the admissibility of the dying declarations, upon proof of the condition of the mind of the deceased at the time they were made; and if the proof does not satisfy the court beyond a reasonable doubt that they were made in extremity and that they are dying declarations within the law, they should not be permitted to go to the jury.⁵ But after they are admitted, their credibility is entirely within the province of the jury.⁶

§ 889. **Substance of Dying Declarations — Testimony and Depositions Admissible.** — Where evidence of the dying declarations or of the former testimony of a person is admissible, it need not be given in exact words; the substance of such declarations⁷ or testimony⁸ if the witness is not able to state the precise language used, is all that is required.

¹ 1 Greenl. Ev., § 159; 3 Leigh R., 787; Vass v. Com., 8 Leigh, 786.

² People v. Green, 1 Park. Cr. R., 302, 1 Denio, 614.

³ People v. Green, 1 Denio, 614; Pennsylvania v. Stoops, Addis., 381.

⁴ Moore v. State, 12 Ala., 764.

⁵ 1 Greenl. Ev., § 160; Starkey v. People, 17 Ills., 21; Rex v. Van Butchell, 7 Car. & P., 187; State v. Poll, 1 Hawks, 444; Com. v. Hill, 2 Grat., 594; Rex v. Bonner, 8 Car. & P., 386; Donnolly v. State, 2 Dutch., 601.

⁶ Rex v. Gay, 7 Car. & P., 230; Leach v. Simpson, 5 Mees. & W., 309; Jackson v. Kniffen, 2 John., 35; Starkey v. People, 17 Ills., 21; Lambert v. State, 23 Missis., 355; Nelson v. State, 13 Sm. & M., 506; State v. Thawley, 4 Harring., 562.

⁷ Starkey v. People, 17 Ills., 23; Montgomery v. State, 11 Ohio, 424; Nelson v. State, 13 Sm. & M., 500; Ward v. State, 8 Blackf., 101.

⁸ Kenduck v. State, 10 Humph., 479; Summons v. State, 5 Ohio S., 325; Young v. Dearborn, 2 Fost. N. H., 372.

3. CONTINUANCE.

§ 890. **For Witnesses.**—At common law the court might in its discretion put off the trial in a criminal case where it appeared: 1. That the witness was really material and appeared to the court so to be. 2. That the party who applied had been guilty of no neglect. 3. That the witness could be had at the time to which the trial was deferred.¹ In this state we have, however, a statute modifying the common law in some respects in civil cases, and possibly some of the provisions of the statute apply to criminal cases.² But it has been held that the provisions of the statute contained in the general practice act of 1845, relating to continuances,³ and of the act of 1867, being an amendment of the original practice act relating to the admission of the affidavit for a continuance⁴ of which the present statute is a substantial copy,⁵ did not apply to criminal cases.

§ 891. **Diligence.**—The party applying for a continuance must show that he has used a reasonable degree of diligence;⁶ as that the absent witness has been subpoenaed⁷ if within the jurisdiction of the court;⁸ or that an effort in that direction

¹ 1 Chitty Cr. L., 491-494; 1 Arch. C. P. & Pl., 567, 568; 2 Whart. Cr. L., §§ 2929-2937; *Rex v. D'Eon*, 1 Blk. Rep., 510, 3 Burr, 1513; *People v. Vermilyea*, 7 Cowen, 384; *State v. Fyles*, 3 Brev., 304; *Muller's Case*, 8 Grat., 695; *Lyon v. Boilvin*, 2 Gilm., 637; *Pledsoe v. Com.*, 6 Rand., 673; *Gross v. State*, 2 Carter, 135; *Spencer v. State*, 8 Blackf., 281.

² R. S., 780, §§ 43-48.

³ *Baxter v. People*, 3 Gilm., 368.

⁴ *Van Meter v. People*, 60 Ills., 168.

⁵ R. S. of 1845, 415, § 13; Laws 1867, 157, § 1; R. S., 780, §§ 43, 48.

⁶ R. S., 780, § 43; 1 Chitty Cr. L., 492, 493; *People v. Vermilyea*, 7 Cowen, 384; *Fiott v. Com.*, 12 Grat., 564; *Weeks v. State*, 31 Missis., 490; *Hurd's Case*, 5 Leigh, 715; *People v. Baker*, 1 Cal., 403; *Vickers v. Hill*, 1 Scam., 307; *Dunlap v. Davis*, 5 Gilm., 84; *Cole v. Choteau*, 18 Ills., 441; *Shook v. Thomas*, 21 Ills., 87; *Doe v. Johnson*, 2 Scam., 522; *State v. McComb*, 18 Iowa, 43; *State v. Rorarbacher*, 19 Iowa, 154.

⁷ *Wright v. State*, 18 Ga., 383; *Wade v. Halligan*, 16 Ills., 507; *McConnel v. Johnson*, 2 Scam., 522; *Day v. Gilston*, 22 Ills., 102; *Moore v. Goelitz*, 27 Ills., 18; *Richardson v. People*, 31 Ills., 170; *State v. Cross*, 12 Iowa, 66.

⁸ *Allen v. Downing*, 2 Scam., 457; *Lyon v. Boilvin*, 2 Gilm., 629; *Quincy Whig Co. v. Tillson*, 67 Ills., 351.

has been made.¹ Where the witness resided in the same county in which the trial was had, a delay of six months without serving a subpoena on the witness, was held to be a want of proper diligence.² But where a party issued a subpoena to the sheriff of the county where the witness had formerly been residing and the officer receiving the subpoena searched for him, but was unable to find him on account of the witness having recently removed from such county of which removal the party had no knowledge, it was held that he was not guilty of a want of diligence though the subpoena was not served.³ On the first application for a continuance an affidavit which shows that the witnesses have been duly subpoenaed to attend the court at which the trial is to be had shows sufficient diligence. The court may ascertain whether the witnesses are present by having them called, and if they answer and attend, may overrule the application for a continuance.⁴ Greater diligence is required on a second or any subsequent application. On such application the party should state that he expects to be able to procure the attendance of his witness at the next term, that the witness is not absent by his permission and all the facts showing the materiality of his evidence and that the application is not made for delay. If within reach of process an attachment should be issued for the witness.⁵ When an application for a continuance for the third time is made on account of the absence of the same witness, the court may properly require unusual diligence to be shown. In such case where the witness resided in the county where the trial was had and the affidavit failed to show that the witness had been

¹ 1 Arch. C P. & Pl., 570; *Dutton v. State*, 5 Port. Ind., 533; *Adams v. Colton*, 2 Scam., 71.

² *Eames v. Hennessy*, 22 Ills., 631.

³ *Adams v. Colton*, 2 Scam., 71.

⁴ *Wade v. Halligan*, 16 Ills., 511.

⁵ *Shook v. Thomas*, 21 Ills., 87; *Birks v. Houston*, 63 Ills., 77; *McConnel v. Johnson*, 2 Scam., 528; *Dunlap v. Davis*, 5 Gilm., 85; *Holt v. Com.*, 3 Va. Cas., 156; *Earp v. Com.*, 9 Dana, 302; *Com. v. Hilliard*, 1 Mass., 6; *Hurd v. Com.*, 5 Leigh, 715; *Nelson v. State*, 2 Swan, 482.

subpœnaed, it was held that the application was properly denied.¹ To justify the continuance of a cause a second time for the reason that the same witness cannot be found, something more than the writing of letters and making inquiries is required; for in these days of rapid communication and cheap traveling the party is required, if he is not confined in jail, to go and look for his witness.² If a party relies upon the promise of a witness to be present at a trial he cannot obtain a continuance if the witness does not attend,³ not even if the witness has been subpœnaed by the other party;⁴ for the party does not use due diligence to secure the attendance of a witness unless he subpœnaes him if he is within the reach of a subpoena and can be found.⁵ But when a witness actually attends upon request, the party's diligence is as complete as if he attended upon a subpoena, and if such witness leaves suddenly on account of sickness in his family, a continuance should be granted, though no subpoena has been served upon him.⁶ The law does not require a party to do a useless act, therefore if a witness or his family is so sick that the witness cannot attend the trial, the omission to subpoena him does not show a want of diligence.⁷ A party does not show diligence if he relies upon making proof by a witness who upon examination disappoints him. It is his duty to inform himself as to the knowledge of the witness, and if he does not possess the requisite information he should procure the attendance of others.⁸ Where the witness resides out of the state or beyond the reach of a subpoena the law does not require the party applying for a continuance in criminal

¹ *Birks v. Houston*, 63 Ills., 77; *State v. Cross*, 12 Iowa, 66.

² *Stevens v. Sherwood*, 22 Ills., 240.

³ *Day v. Gelston*, 22 Ills., 103; *Moore, Goelitz*, 27 Ills., 18; *Gass v. Howard*, 43 Ills., 223; *McConnel v. Johnson*, 2 Scam., 522.

⁴ *Moore v. Goelitz*, 27 Ills., 18; *State v. Cross*, 12 Iowa, 66.

⁵ *McConnel v. Johnson*, 2 Scam., 522; *Day v. Gelston*, 22 Ills., 102; *Moore v. Golitz*, 27 Ills., 18; *Richardson v. People*, 31 Ills., 170.

⁶ *Searls v. Munson*, 17 Ills., 558; *Reg. v. Nicholas*, 2 Car. & K., 248.

⁷ *Allen v. Downing*, 2 Scam., 455; *Searls v. Munson*, 17 Ills., 558.

⁸ *Cole v. Choteau*, 18 Ills., 439.

cases as it does in civil cases,¹ to show that he has used diligence in taking the testimony of the witness on a deposition for the reason that the statutes relating to depositions do not apply to criminal cases, but he must show the grounds of the expectation of procuring the testimony of the witness at a future time.² And it is said that in cases of misdemeanors the deposition of absent witnesses may be taken by consent; and if the attendance of material witnesses for the defendant cannot be procured, he may offer to join in a commission to take their depositions, and the court will have a discretion to continue the cause from term to term until the other party will join, and when both have joined the cause will be continued until the next term.³ If the prisoner has no time or opportunity to prepare for his defense, this will be a good ground for a postponement.⁴ And where a party uses reasonable diligence in ascertaining what he can prove by witnesses, he has a reasonable time after he learns that he can prove material facts by them in which to procure their testimony.⁵ Upon an application for a continuance there is no certain rule as to question of diligence. Each case depends upon the particular circumstances shown.⁶ The party desiring the continuance is bound to show that he has made reasonable exertions to prepare for trial, without success, or some good reason for not making such exertions.⁷ Where

¹ *McConnel v. Johnson*, 2 Scam., 527; *Lyon v. Boilvin*, 2 Gilm., 629; *Morgan v. Raymond*, 38 Ills., 449; *Gass v. Howard*, 43 Ills., 223; *Marble v. Bonhotel*, 35 Ills., 241.

² *Eubanks v. People*, 41 Ills., 486; *Richardson v. People*, 31 Ills., 173; *State v. Rorabacher*, 19 Iowa, 154.

³ *Richardson v. People*, 31 Ills., 170.

⁴ *State v. Lewis, Bay*, 1; Ills., Mu. Ins. Co. v. *Marseilles Man. Co.*, 1 Gilm., 236.

⁵ *Lee v. Bates*, 1 Scam., 528; *Morgan v. Raymond*, 30 Ills., 449; *Freeman v. Tinsley*, 50 Ills., 497.

⁶ *Cole v. Choteau*, 18 Ills., 439; *Shook v. Thomas*, 21 Ills., 87.

⁷ *Dunlap v. Davis*, 5 Gilm., 84; *Miles v. Danforth*, 32 Ills., 59; *Moore v. Goelitz*, 27 Ills., 18; *Gass v. Howard*, 43 Ills., 223; *Richardson v. People*, 31 Ills., 170; *Wiley v. Platter*, 17 Ills., 538.

the witness is absent by the connivance of the prisoner the court will not grant a continuance on his motion.¹

§ 892. **Facts to be Proved Must be Material — How Stated — Character.** — A motion for a continuance founded upon the absence of a witness, will be properly refused if the facts to be proved are not shown to be material to the cause.² If the testimony sought is important only in connection with certain facts, those facts must be set forth or referred to in the affidavit, so that the materiality of the evidence may be apparent to the court.³ It is not sufficient for the party to state his opinion as to the materiality of the evidence⁴ or to state generally, that he expects to prove that he is not guilty or any other conclusion of law; for the particular fact or facts which can be proven and in what way they are material, must be stated.⁵ And these facts must be stated with such certainty that the opposite party may admit them and go to trial.⁶ And the party must show what means the witnesses had to know the facts expected to be proved by them.⁷ Where the application is made by the prisoner, he is required to show that he has a defense; his statements will always be closely scrutinized. It will be presumed that he has made the strongest possible statement in his own favor.⁸ That a witness whose testimony is to impeach another witness to be introduced by the prosecution, is absent, is a good ground for

¹ *Wormley v. Com.*, 10 Grat., 658.

² *Ballston Spa. Bank v. The Marine Bank*, 16 Wis., 120; 10 Ind., 40; *Dodge v. Deal*, 28 Ills., 303; *Lyon v. Boilvin*, 2 Gilm., 637; *Moody v. People*, 20 Ills., 315; *McKichan v. McBean*, 45 Ills., 228; 1 Chitty Cr. L., 492; *Lee v. Bates*, 1 Scam., 528; *Steele v. People*, 45 Ills., 152; *People v. Vermilyea*, 7 Cowen, 384; 8 Iowa, 420.

³ *Bailey v. Hardy*, 12 Ills., 459.

⁴ 1 Arch. C. P. & Pl., 570; *Rhea v. State*, 10 Yerg., 258; *McDaniel v. State*, 8 Sm. & M., 401.

⁵ *Moody v. People*, 20 Ills., 317; *Steele v. People*, 45 Ills., 152; *Smith v. Powell*, 50 Ills., 21; *Knight v. State*, 5 Humph., 599; *State v. Sater*, 8 Iowa, 420.

⁶ *McBain v. Enloe*, 13 Ills., 76; *Moody v. People*, 20 Ills., 315.

⁷ *Eubanks v. People*, 41 Ills., 486.

⁸ *State v. People*, 45 Ills., 152; *Farrell v. McKee*, 36 Ills., 231; *Jim v. State*, 15 Ga., 535.

a continuance.¹ Although good character can be given in evidence in every case, yet if there is no other ground of defense, a continuance will not be granted for such purpose alone.² Neither will the defendant be entitled to a continuance on the ground that he expects to prove an alibi by an absent witness on the day laid in the indictment, if the prosecution will waive proving the offense on that day.³ Where the affidavit of the accused stated that he expected to prove by the absent witness that he heard the witness upon whom the people mainly rely for a conviction, say that "if hard swearing, would send the defendant to the penitentiary, he should go," it was held sufficient.⁴

FORM OF AN AFFIDAVIT OF A PRISONER FOR A CONTINUANCE.

State of Illinois,⁵ }
Adams County. } ss.

IN CIRCUIT COURT.

To — Term, A. D. 18—

C. D.⁶ }
ads. }
The People of the } *Indictment for Larceny.*
State of Illinois. }

C. D., the above-named defendant,⁷ being duly sworn on his oath,

¹ Studstill v. State, 7 Ga., 2; but see State v. Rorabacher, 19 Iowa, 155.

² 1 Chitty Cr. L., 492; Steele v. People, 45 Ills., 152; Rhea v. State, 10 Yerg., 258; People v. Wilson, 3 Park. Cr. R., 199; Earp v. Com., 9 Dana, 302; Rex v. Jones, 8 East, 34; *contra*, State v. Nash, 7 Iowa, 347.

³ Dacy v. State, 17 Ga., 439.

⁴ Fox v. State, 9 Ga., 373.

⁵ The words State of Illinois, Adams county," in the margin are called the venue. And it has been held that an affidavit without a venue is a nullity. Lane v. Morse, 6 How. N. Y. Pr. R., 395; Cook v. Staats, 18 Barb., 407; but see Graham v. Anderson, 42 Ills., 515.

⁶ An affidavit made after the indictment, cannot be read unless correctly entitled. Watson v. Reissig, 24 Ills., 281; but see Wilbourne v. Blackstone, 41 Ills., 265; White v. Hess, 8 Paige, 544; Seymour v. Bailey, 5 Chicago Legal News, 268; nor can perjury be assigned for making it; Humphrey v. Cande, 2 Cowen, 509; Spring v. Robinson, 2 Pin. Wis., 97; Milliken v. Selye, 3 Denio, 56.

⁷ The affidavit must, in general, be made by the party applying for the continuance; 1 Chitty Cr. L., 493; Com. v. Knapp, 9 Pick., 515; though in some cases his attorney, or a third person has been allowed to make it in his stead, 1 Arch. C. P. & Pl., 770.

states that he has fully and fairly stated this case to E. F., Esq., of ———, in said county, defendant's counsel in this cause, and that the defendant has a good and substantial defense on the merits to the indictment in this action as he is advised by his said counsel, and verily believes; and that (*insert a special statement of the facts showing that the party has a defense.*)¹

And this deponent further says that he cannot safely proceed to the trial of the above-entitled cause at the present term of court, on account of the absence of G. H.,² a material witness on the part of deponent; that said witness is a resident³ of, etc. (*here state the residence of the witness and where he is*),⁴ and that he expects to prove by the said G. H. that, etc. (*here state specially the precise facts*,⁵ *he expects to prove and show how those facts are material*); that he knows of no other person by whom he can prove the facts last above stated,⁶ and deponent further says that (*here state what diligence⁷ has been used to procure the attendance of the witness*); that the witness is not absent by the permission or consent of this deponent;⁸ that he expects to procure the testimony of the said G. H. at the next term of this court⁹ (*if the witness resides out of the state, add "for the reason," here state the grounds of the*

¹ The prisoner is required to show that he has a defense. *Steele v. People*, 45 Ills., 152; *Ballston Spa. Bank v. The Marine Bank*, 16 Wis., 120.

² The name of the witness must be set forth, or a sufficient reason given for the omission. 1 Arch. C. P. & Pl., 570; *Forrester v. Guard*, Breese, 44; 2d Ed., 74; 1 Chitty Cr. L., 492; *Smith v. Powell*, 50 Ills., 21; *Adams v. Colton*, 2 Scam., 71; *Mull's Case*, 8 Grat., 695; *Hurd's Case*, 5 Leigh, 715.

³ The affidavit will be insufficient unless it states the place of residence of the witness, or if his place of residence is not known, it must show that due diligence has been used to ascertain the same. R. S., 780, § 43; *Lee v. Quirk*, 20 Ills., 392; 1 Chitty Cr. L., 492; *Smith v. Powell*, 50 Ills., 21; *Adams v. Colton*, 2 Scam., 71; *Gordon v. Spencer*, 2 Blackf., 285.

⁴ The affidavit should show where the witness is, so that the court may know that he is not within the reach of subpoena. *Richardson v. People*, 31 Ills., 170.

⁵ As to how the facts should be stated, see *ante* § 892.

⁶ The affidavit must show that there are no other witnesses to prove the same facts as completely as by the absent witness. *Eams v. Hennessy*, 22 Ills., 628; *State v. Sater*, 8 Iowa, 420; *McKichan v. McBean*, 45 Ills., 228; *Jarvis v. Shacklock*, 60 Ills., 378, unless the affidavit states that the witness will be contradicted by other evidence as to the facts to be proved by him. *Eames v. Hennessy*, 22 Ills., 631; *Shook v. Thomas*, 21 Ills., 90.

⁷ As to the diligence required to be shown, see *ante* § 891.

⁸ These words are necessary on the second or any subsequent application for a continuance, on account of the absence of the same witness. *Shook v. Thomas*, 21 Ills., 87.

⁹ The words "that he expects to procure the testimony of the said G. H. at the next term of this court," or words to the same effect, are indispensable. *Eames v. Hennessy*, 22 Ills., 628; 1 Chitty Cr. L., 492.

*expectation of procuring the testimony of the witness at some future time,*¹ and that this application for a continuance is not made for delay, but that justice may be done.

C. D.

Sworn and subscribed to before me, }
this — day of —, A. D. 18—. }

G. B., Clerk,

§ 893. **Amendment of Affidavit for a Continuance.**—As a general rule it is highly improper to allow a party whose affidavit for a continuance has been held to be insufficient, subsequently to amend and make it good.² Yet we see no reason why the court should not allow such an affidavit to be amended when satisfied that the ends of justice will be promoted thereby.

§ 894. **Contradicting Affidavit.**—For the purposes of the motion for a continuance the affidavit on which the motion is founded must be taken as true and no counter-affidavits can be received; nor can it be contradicted, either by cross-examination or *aliunde* proof.³

§ 895. **Grounds for a Continuance Other than for the Absence of a Witness.**—It has been held that a continuance may be granted on account of the inability of the defendant⁴ or of his counsel,⁵ or of a material witness⁶ (by reason of sickness⁷ or

¹ In a criminal case, where the witness resides out of the state, the affidavit must show the grounds of the expectation of procuring his testimony at a future time. *Eubanks v. People*, 41 Ills., 486; 1 Chitty Cr. L., 492; *People v. Vermilyea*, 7 Cowen, 384; *Rex v. D'Eon*, 1 Blk. Rep., 514, 3 Bur., 1513; *Com. v. Hilliard*, 1 Mass., 6; *State v. Zellers*, 2 Halst., 220; *State v. Fyles*, 3 Brev., 304; *U. S. v. Gilbert*, 2 Sum., 19.

² *McBain & Enlow*, 13 Ills., 76; *People v. Robtaille*, 5 City H. Rec., 171.

³ 1 Arch. C. P. & Pl., 569; *Bishop v. State*, 9 Ga., 121; *State v. Brown*, 17 Iowa, 46; *Quincy Whig Co. v. Tillson*, 67 Ills., 351; *contra*, *Rex v. D'Eon*, 1 Blk. Rep., 510, 3 Burr, 1513; *People v. Vermilyea*, 7 Cowen, 384; *People v. Brigham*, 1 City. H. Rec., 30, 50 Barb., 354.

⁴ Chitty Cr. L., 494; 2 Whart. Cr. L., §§ 2929, 2939; *Ginrich v. People*, 34 Ills., 449; *Rose v. Stuyvesant*, 8 John., 426; but see *Ault v. Rawson*, 14 Ills., 490; *Duncan v. Niles*, 32 Ills., 511.

⁵ 1 Chitty Cr. L., 491; *Jarvis v. Shacklock*, 60 Ills., 378; *Allen v. State*, 10 Ga., 85; *contra*, *State v. Ostrander*, 18 Iowa, 448.

⁶ 1 Arch. C. P. & Pl., 566; *Reg. v. Nicholas*, 2 Car. & K., 246; *Hooker v. Rogers*, 6 Cowen, 577.

⁷ *People v. Logan*, 4 Cal., 188; *Jarvis v. Shacklock*, 60 Ills., 378; but see *Ault v. Rawson*, 14 Ills., 490.

other good cause) to attend the trial. Death of counsel occurring so suddenly as to prevent the engagement of others is generally a good ground for a continuance;¹ but the absence of counsel is rarely received as in itself adequate.² The trial may be postponed, on the ground of the publication of a libel, tending to influence the minds of the jurors in forming their decision.³ Where the public excitement is such as to intimidate and swerve the jury, a continuance should be granted.⁴ But the fact of ordinary newspaper paragraphs existing on the subject is not enough.⁵ Where the excitement is the result of the defendant's own action, the application will be refused.⁶ In case of the absence of the judge on the first and second days of the term, the cause will be continued by operation of law.⁷ And where the venue in a cause has been changed the court, instead of dismissing the cause because the original papers with the record of the proceedings have not been transmitted to the county to which the change was taken, may continue the cause, and on motion require the clerk to certify and transmit the papers.⁸

§ 896. *Motion for a Continuance.*—The court will not grant a continuance unless a motion for it is made.⁹ An affidavit setting forth the facts upon which a continuance of a cause should be allowed does not of itself constitute a motion for that purpose. The affidavit is only evidence of facts sought to be established in support of a motion.¹⁰

¹ *Hunter v. Fairfax*, 3 Dall., 305.

² *McKay v. Mu. Ins. Co.*, 2 Ca, 384; *Hammond v. Haws, Wallace*, 1; *Allen v. State*, 10 Ga., 85; *Bulloch v. State*, 10 Ga., 46; *Wright v. State*, 18 Ga., 383; but see *Rhode Island v. Massachusetts*, 11 Peters, 226; 3 E. D. Smith, 59.

³ 1 Chitty Cr. L., 491; Whart. on Cr. L., § 2940; 1 Burrows, 510.

⁴ *Com. v. Dunham, Thatch. C. C.*, 516; *Com. v. Fannagan*, 7 Watts, 418; *Bishop v. State*, 9 Ga., 121; but see *Jim v. State*, 15 Ga., 535; *Georgia v. Wright*, 18 Ga., 383.

⁵ *Com v. Carson*, 1 Wheel. C. C., 488.

⁶ *U. S. v. Porter*, 1 Baldwin, 78.

⁷ *Knickerbocker v. Knickerbocker*, 58 Ills., 400.

⁸ *Wight v. Kirkpatrick*, 4 Scam., 339

⁹ *Burlingame v. Turner*, 1 Scam., 588.

¹⁰ *Morrell v. People*, 32 Ills., 499.

§ 897. **Effect of Admitting the Truth of the Facts Stated in the Affidavit.**—In a criminal case the court may permit the prosecuting attorney to admit the absolute truth of the facts, which the accused in his affidavit for a continuance alleges he can prove by the absent witness, without the right to contradict their truth and require the defendant to go to trial.¹ It has, however, been held in another state that although the prosecuting attorney admits not only that the absent witness will testify as stated, but also that the facts are true as set forth in the affidavit, such an admission cannot preclude the defendant in a criminal case from his constitutional right of having the witnesses personally present at the trial.² An admission by the state's attorney that the witness, if present, would swear to the facts contained in the affidavit, will not in a criminal case justify the court in overruling the motion for a continuance and requiring the party to proceed to trial on such admission.³ When the facts set forth in the affidavit are admitted to avoid a continuance, they cannot be contradicted on the trial;⁴ but such affidavits are not admissible on a second trial of the same cause at a subsequent term.⁵

§ 898. **When Error to Refuse to Grant a Continuance.**—Formerly it was held that motions for continuancies in both civil⁶ and criminal cases⁷ were addressed solely to the discretion of

¹ *Van Meter v. People*, 60 Ills., 169; *Nickers v. Hill*, 1 Scam., 307; *Willis v. People*, 1 Scam., 402; *McBain v. Enloe*, 13 Ills., 76; *People v. Wilson*, 3 Park. Cr. R., 199.

² *Goodman v. State*, 1 Meigs, 195; *Summons v. State*, 5 Ohio, N. S., 325.

³ *Van Meter v. People*, 60 Ills., 168; *People v. Vermilyea*, 7 Cowen, 384; *Prill v. Lord*, 14 John., 341; 6 Cal., 248; 8 Ind., 113; *Id.*, 291; 9 Ind., 340; *Id.*, 563; *Trulock v. State*, 1 Iowa, 519; *contra*, *Starr v. State*, 25 Ala., 49; *State v. Mooney*, 10 Iowa, 507; *State v. McComb*, 18 Iowa, 43; *State v. Shannehan*, 22 Iowa, 432; *Farrand v. Bouchell*, Harper, 83; *Browning v. State*, 33 Missis., 48; *State v. Sater*, 8 Iowa, 424.

⁴ *Willis v. People*, 1 Scam., 405; *Supervisors of Fulton Co. v. M. & W. R. Co.*, 21 Ills., 338; *contra*, *Olds v. Com.*, 3 Marsh, 467.

⁵ *State v. Felter*, 32 Iowa, 50.

⁶ *Cornelius v. Boucher*, Breese, 12, 2d Ed., 32; *Collins v. Claypole*, Breese, 164, 2d Ed., 212; *Rountree v. Stuart*, Breese, 169, 2d Ed., 73; *Vickers v. Hill*, 1 Scam., 307.

⁷ *Baxter v. People*, 3 Gilm., 368; *Holmes v. People*, 5 Gilm., 478; *State v. Reid*, 20 Iowa, 419.

the court, and that its decisions thereon could not be assigned for error. But the law is now changed by statute, so that it is error to refuse to grant a continuance, either in a civil¹ or criminal² case, if the party shows himself entitled to it. An affidavit for a continuance which does not pretend to bring the case within the statute as a matter of right is still addressed to the discretion of the judge to whom the application is made.³ It cannot be assigned for error that the court granted a continuance;⁴ or refused to allow a party to file a new and further affidavit for a continuance, after the motion on the affidavits filed has been denied;⁵ or refused to grant a continuance of a motion for a new trial on the ground of surprise in the testimony of the adverse party, to enable the party to procure affidavits of witnesses to disprove the unexpected testimony in support of the motion;⁶ or refused to grant a continuance because a return of the cause with a mandate from the Supreme Court to the circuit court had not been filed ten days before the term;⁷ or because the party did not know the mandate had been filed in the circuit court.⁸ In the absence of a bill of exceptions setting forth the facts, the presumption is that a motion for a continuance was properly decided.⁹ The error in refusing to grant a continuance on account of the absence of a material witness is cured if the witness comes into court and testifies before the end of the trial.¹⁰

§ 899. Unauthorized Withdrawal of Witnesses During the Trial.

¹ R. S., 782, § 62; *Cole v. Choteau*, 18 Ills., 439; *Adams v. Colton*, 2 Scam., 71; *Welsh v. Savery*, 4 Iowa, 241.

² R. S., 782, § 63; *Van Meter v. People*, 60 Ills., 169; *Fox v. State*, 9 Ga., 373; *State v. Cox*, 10 Iowa, 351; *State v. Farr*, 33 Iowa, 553.

³ *Ault v. Rawson*, 14 Ills., 485; *Jarvis v. Shacklock*, 60 Ills., 378; *Farrell v. McKee*, 36 Ills., 231; *Trulock v. State*, 1 Iowa, 515.

⁴ *Brooks v. McKinney*, 4 Scam., 309.

⁵ *McBain v. Enloe*, 13 Ills., 76.

⁶ *T. W. & W. R. W. Co. v. McLaughlin*, 58 Ills., 389.

⁷ *Dodge v. Deal*, 28 Ills., 303.

⁸ *Murray v. Whittaker*, 17 Ills., 230.

⁹ *Bishop v. Edgerton*, 26 Ills., 54.

¹⁰ *Mitchell v. State*, 22 Ga., 211.

—Where a party is surprised by the unauthorized withdrawal of his witnesses after the trial has commenced, the practice is to apply for a continuance or postponement of the trial, and should the court unadvisedly refuse the application, such refusal may be made the ground of an application for a new trial.¹

§ 900. **Setting Aside Order for a Continuance.**—Where a party has applied for and obtained a continuance, it is error for the court to set aside the order granting the continuance and dismiss the suit for want of prosecution, without first giving a reasonable notice to the party at whose instance the continuance was granted.²

¹ 2 Whart. C. L., § 2930; *Colton v. State*, 4 Texas, 260.

² *McKee v. Ludwig*, 30 Ills., 38; *McKay v. State*, 13 Missis., 492.

SECTION VII.

THE PETIT JURY.

§ 901. The Number.

- 902. Less than Twelve by Consent.
- 903. Drawing and Summoning, etc., of the Jury.
- 904. Impaneling the Petit Jurors—Drawing.
- 905. Passing upon Jurors.
- 906. Who Exempt from Serving as Jurors.
- 907. Causes for Challenge of a Petit Juror.
- 908. Statutory Grounds for Challenge of Juror.
- 909. Challenge of Juror for having Formed an Opinion.
- 910. Opinions which Disqualify a Juror.
- 911. Challenge for Favor.
- 912. When Challenge may be Made.
- 913. Challenge, how Made.
- 914. Challenges, how Tried.
- 915. Juror may be Sworn as to his Competency.
- 916. Objections to Jurors, how Waived.
- 917. When Overruling Objection to a Juror Error.
- 918. Peremptory Challenges—The Statute.
- 919. Continued—Decisions.
- 920. Who may be Sworn as Jurors.
- 921. Swearing the Jury.
- 922. Trial of Several Causes by the Same Jury.
- 923. Disposition of the Jury During the Trial.
- 924. Separation of the Jury by Consent.
- 925. Officer Attending Jury in the Absence of the Court to be Sworn.
- 926. Penalty for Violating Oath taken by the Officer Attending the Jury.

§ 901. The Number.—At common law a jury consisted of twelve men.¹ A statute which deprives the accused in a criminal case of a trial by that number,² or of a verdict with-

¹ *Cancemi v. People*, 18 N. Y., 135; *May v. Milwaukee & M. R. Co.*, 3 Wis., 219.

² 1 Bish. Cr. P., § 897; *Vaughn v. Scade*, 30 Mo., 600; *Wynehammer v. People*, 13 N. Y., 378; *Ware v. Nottinger*, 35 Ill., 375; *contra*, *Murphy v. People*, 2 Cowen, 815; *People v. Fisher*, 20 Barb., 652.

out the unanimous consent of twelve jurors,¹ is unconstitutional and void. If, however, the statute provides for a trial with a less number, and then authorizes an appeal on which a trial may be had before a full jury, it does not violate the constitution by reason of its merely erecting this vestibule through which the parties may enter to find the jury beyond.²

§ 902. *Less than Twelve by Consent.*—The consent of the parties will authorize the judge to act in the place of a jury in a case of misdemeanor.³ Where the defendant consented to be tried for a misdemeanor by a jury of a less number than twelve, it was held that the verdict should not be set aside for irregularity;⁴ while in another state it was held that the consent of the prisoner to his trial for a felony by less than a full jury of twelve was a nullity and the conviction illegal.⁵ But the tendency of the decisions in this state is in favor of allowing the prisoner by his express consent to waive or admit any or all of his rights away even in a case of felony.⁶

§ 903. *Drawing and Summoning, etc., of the Jury.*—The preparation of lists from which the jurors are drawn,⁷ and the manner of drawing⁸ and summoning⁹ of the jurors, their examination¹⁰ and the filling of the panel¹¹ is provided for by statute. It is too late to object for the first time on error to

¹ *Work v. State*, 2 Ohio, 296; *People v. Kennedy*, 2 Park. Cr. R., 318; 41 N. H., 553; *Ross v. Irving*, 14 Ills., 171.

² *State v. Brennan's Liquors*, 25 Conn., 278; *Biddle v. Com.*, 13 Serg. v. R., 405; *State v. Beneke*, 9 Iowa, 207; *Banrouse v. State*, 1 Iowa, 374; *People v. Goodwin*, 5 Wen., 251; *Jones v. Robbins*, 8 Gray, 329.

³ *Darst v. People*, 51 Ills., 286; *Zarreseller v. People*, 17 Ills., 101; *People v. Scates*, 3 Scam., 351; *Burgwin v. Babcock*, 11 Ills., 30; *Ware v. Nottinger*, 35 Ills., 375; *contra*, 1 Bish. Cr. P., § 898.

⁴ *Com. v. Daily*, 12 Cush., 80; *Murphy v. Com.*, 1 Met. Ky., 265; *Tyra v. Com.*, 2 Met. Ky., 1.

⁵ *Cancemi v. People*, 18 N. Y., 129.

⁶ *People v. Scates*, 3 Scam., 353; *Chase v. People*, 40 Ills., 356.

⁷ R. S., 630, §§ 1, 2, 5, 6, 7.

⁸ *Id.*, 631, § 8.

⁹ *Id.*, 632, §§ 10, 11.

¹⁰ *Id.*, § 12.

¹¹ *Id.*, 633, § 13.

any irregularity in the impaneling of a petit jury.¹ Where the panel of the petit jury is improperly filled or the jurors improperly selected, the objection should be taken by a challenge to the array, or by a motion to quash the order for a tales, or it will be considered as waived. The objection cannot be taken by a challenge to the polls.²

§ 904. **Impaneling the Petit Jurors — Drawing.** — The statute provides that "it shall be the duty of the clerk of the court, at the commencement of each week of the term, to write the name of each petit juror summoned and retained for the week on a separate ticket, and put the whole into a box or other place for safe keeping; and as often as it shall be necessary to impanel a jury, the clerk, sheriff or coroner shall, in the presence of the court, draw by chance twelve names out of such box or other place, which shall designate the twelve to be sworn on the jury, and in the same manner for the second jury, in their turn as the court may order and direct."³

§ 905. **Passing Upon Jurors.** — Whether the statute applicable to civil cases, making it the duty of the court, upon request of either party to the suit, to order the full number of jurors into the jury box before either party shall be required to examine any of said jurors,⁴ is by the twenty-third section of the act relating to jurors⁵ made applicable to criminal cases, does not seem clear. If this statute does not apply, then there is no law requiring in a criminal case, twelve or four jurors to be called at a time to be sworn. A less or a greater number than four may be called at any one time, and the parties be required to pass upon them.⁶ It has been held to be irregular for counsel to put questions to the jurors called without interposing any challenge; and that error could not be assigned to the action of the court in allowing jurors thus

¹ *Schirmer v. People*, 33 Ills., 276.

² *Gropp v. People*, 67 Ills., 154.

³ R. S., 634, § 20

⁴ *Id.*, § 21.

⁵ *Id.*, 635, § 23.

⁶ *Walker v. Collier*, 37 Ills., 362.

questioned, but not challenged, to be sworn to try the case.¹ But in California, the defendant may ask the jurors if they have formed or expressed an opinion before challenging them for cause,² which is probably the law in this state.

§ 906. **Who Exempt from Serving as Jurors.**—The statute provides that “the following persons shall be exempt from serving as jurors, *to wit.*: the governor, lieutenant governor, secretary of state, auditor of public accounts, treasurer, superintendent of public instruction, attorney general, members of the general assembly during their term of office, all judges of courts, all clerks of courts, sheriffs, coroners, post-masters, mail-carriers, practicing attorneys, all officers of the United States, officiating ministers of the gospel, school teachers during the terms of school, practicing physicians, constant ferrymen, mayors of cities, policemen and active members of the fire department.”³

§ 907. **Causes for Challenge of a Petit Juror.**—It is a sufficient cause for challenge of a petit juror that he is an alien;⁴ that the juror is related to either the prosecutor or the accused within the ninth degree,⁵ even though it is only by marriage,⁶ but such disqualifying affinity ceases with the dissolution by the death of one of the married parties, leaving no offspring, or if the relationship be remote, as where the juror’s sister was the wife of the nephew of one of the parties⁷

¹ Crippen v. People, 8 Mich., 117.

² People v. Backus, 5 Cal., 275.

³ R. S., 631, § 4.

⁴ Id., 640, §§ 1, 2; Id., 633, § 14; 1 Arch. C. P. & Pl., 545; Guykowski v. People, 1 Scam. 476; Stone v. People, 2 Scam., 326; Greenup v. Stoker, 3 Gilm., 222; Chase v. People, 40 Ills., 357; Keenan v. State, 8 Wis., 132; Schumaker v. State, 5 Wis., 824.

⁵ 1 Chitty Cr. L., 541; 1 Bish. Cr. P., § 901; 1 Arch. C. P. & Pl., 546, 549; Fleming v. State, 11 Ind., 234; Jacques v. Com., 10 Grat., 690; State v. Anthony, 7 Ired., 234.

⁶ Co. Lit., 157a; 3 Blk. Com., 363; O’Conor v. State, 9 Fla., 215; State v. Perry, Busbec, 330; Bank v. Hart, 3 Day, 491; Hinkman v. Clark, Coxe, 446; Stevenson v. Stiles, 2 Penn. R., 740; but see 11 Humph., 232; Chase v. Jennings, 38 Me., 44.

⁷ Rank v. Sherry, 4 Watts, 218.

of the marriage by which it was created;¹ that the juror is to receive a part of the fine upon conviction or has a pecuniary interest in the result of the cause;² that the juror is in the power of the accused or in his employment;³ that there are actions depending between the accused and the jurymen which imply hostility;⁴ that since the juror has been summoned he has eaten and drank at the expense of the defendant⁵ or of the counsel for the prosecution;⁶ that the juror is a female,⁷ an idiot,⁸ insane,⁹ or drunk,¹⁰ or too sick to discharge the duties of a juror,¹¹ or is deaf;¹² that the juror has passed upon the guilt or innocence of the accused, either as a grand¹³ or petit¹⁴ juror; or that the juror has made some declaration showing hostility or prejudice or the like;¹⁵ that the juror is god-father to the child of the defendant or the defendant to

¹ 1 Bish. Cr. P., § 901; *State v. Shaw*, 3 Ired., 532; *Moses v. State*, 11 Humph., 232.

² 1 Chitty Cr. L., 541, 542; *Com. v. Eagan*, 4 Gray, 18; *State v. Williams*, 30 Me., 484; *Russell v. Hamilton*, 2 Scam., 56; *Bradshaw v. Hubbard*, 1 Gilm., 390; *Fleming v. State*, 11 Ind., 236. Probably the interest of a taxpayer of the county in the common school fund into which fines, forfeitures and penalties are required by statute to be paid, R. S., 979, § 82; is too remote to disqualify him to be a juror, where a fine, forfeiture or penalty may be recovered, *Middleton v. Ames*, 7 Vt., 166; *Com. v. Reed*, 1 Gray, 472; *Cowen v. People*, 14 Ills., 35.

³ 1 Chitty Cr. L., 541, 542.

⁴ *Id.*; *Fleming v. State*, 11 Ind., 234.

⁵ 1 Chitty Cr. L., 541; *Co. Litt.*, 157.

⁶ *Springer v. State*, 34 Ga., 379.

⁷ 2 Whart. Cr. L., § 3016.

⁸ 3 Blk. Com., 462; 1 Arch. C. P. & Pl.,

⁹ *State v. Scott*, 1 Hawks, 24.

¹⁰ *Thomas v. State*, 27 Ga., 287.

¹¹ *Hogshead v. State*, 6 Humph., 59, 60.

¹² *Jesse v. State*, 20 Ga., 156.

¹³ 1 Arch. C. P. & Pl., 544; *Rex v. Edmonds*, 4 Barn. & Ald., 471; *Rex v. Percival*, 1 Sid., 243; *Rice v. State*, 16 Ind., 298; *Steward v. State*, 15 Ohio S., 155; *Rafe v. State*, 20 Ga., 60; *Rouse v. State*, 4 Ga., 136; *Willis' Case*, 15 Howell St. Tr., 613; *Rogers v. Lamb*, 3 Blackf., 165; *Com. v. Hussy*, 9 Pick., 496.

¹⁴ 1 Bish. Cr. P., § 911; *Spear v. Spencer*, 1 Iowa, 534.

¹⁵ 1 Arch. C. P. & Pl., 545.

his child;¹ that the juror procured the indictment of the defendant;² that the juror's religious views are such as to disqualify him to take an oath.³ It is not a ground of challenge that the juror is a client of the prisoner who is an attorney, or that the juror has visited the prisoner as a friend since he has been in prison;⁴ that the juror belongs to an association whose object is to detect and prosecute persons for crime,⁵ unless he has bound himself to pay a part of the expenses of the prosecution;⁶ that he is a mason, where either the prosecutor or the defendant is or is not a mason;⁷ or that the juror has found an unfavorable opinion of the prisoner's character;⁸ or that the juror has just "set upon a jury for the trial of a person indicted for the same kind of an offense."⁹

§ 908. **Statutory Ground for Challenge of Juror.** — According to the statutes of the state of Illinois, it is a sufficient cause for a challenge that the juror is exempt from serving on the jury;¹⁰ that he is under twenty-one years of age or is sixty years old, or over;¹¹ that he is not in possession of his natural faculties or is infirm or decrepit; that he is not free from all legal exceptions, or of fair character, or of approved integrity, or of sound judgment; that he does not understand the English

¹ 2 Whart. Cr. L., § 3016.

² Id.

³ *Com. v. McFadden*, 11 Harris, 12.

⁴ *Reg. v. Leach*, 9 Car. & P., 499.

⁵ *Musick v. People*, 40 Ills., 269; *Com. v. O'Neil*, 6 Gray, 343; *State v. Wilson*, 8 Iowa, 407.

⁶ *Com. v. Eagan*, 4 Gray, 18; *Com. v. O'Neil*, 4 Gray, 342; *People v. Keyes*, 5 Cal., 24.

⁷ *People v. Horton*, 13 Wen., 9.

⁸ *People v. Mahony*, 18 Cal., 180; *People v. Lohman*, 2 Barb., 216; but see same case, 1 N. Y., 380.

⁹ *State v. Leight*, 17 Iowa, 28.

¹⁰ R. S., 630, § 2; Id., 633, § 14; *Fleming v. State*, 11 Ind., 234. Under a former statute it was held not to be a ground of challenge, that the juror was exempt. *Davis v. People*, 19 Ills., 74; *Chase v. People*, 40 Ills., 356; *Murphy v. People*, 37 Ills., 447.

¹¹ R. S., 630, § 2, Id., 633, § 14; *contra*, *Davis v. People*, 19 Ills., 74; *Murphy v. People*, 37 Ills., 447.

language;¹ that (if he is not of the regular panel) he has served as a juror on the trial of a cause in any court of record in the county,² within one year previous to the time of his being offered as a juror; that he is a party to a suit pending for trial in that court at that term;³ or that he has been convicted of an infamous crime unless restored to the right to serve as a juror by the terms of a pardon for the offense, or otherwise according to law.⁴ In trials for murder it is a cause for challenge of any juror who shall, on being examined, state that he has conscientious scruples against capital punishment, or that he is opposed to the same.⁵

§ 909. **Challenge of Juror for Having Formed an Opinion.**—The statute provides “that in the trial of any criminal cause, the fact that a person called as a juror has formed an opinion or impression, based upon rumor or upon newspaper statements (about the truth of which he has expressed no opinion), shall not disqualify him to serve as a juror in such case, if he shall, upon oath, state that he believes that he can fairly and impartially render a verdict therein, in accordance with the law and the evidence, and the court shall be satisfied of the truth of such statement.”⁶ So far as this statute requires the prisoner to be tried by a juror who has formed an opinion that he is guilty, it is believed that it is unconstitutional;⁷ for it would be better for the prisoner to take from him the right to a trial by jury entirely than to require him to be tried by a jury prejudiced against him. If the juror has a decided or fixed opinion in the case respecting the merits of the contro-

¹ R. S., 630, § 2; Id., 633, § 14.

² *Gropp v. People*, 67 Ills., 154.

³ R. S., 633, § 14; see *Bissel v. Ryan*, 23 Ills., 570.

⁴ R. S., 394, § 279.

⁵ Id., 411, § 433; 1 Bish. Cr. P., § 918; 1 Arch. C. P. & Pl., 552; *Gates v. People*, 14 Ills., 435; *Com. v. Leshner*, 17 Serg. & R., 155; *People v. Damon*, 13 Wen., 351; *Gross v. State*, 2 Carter, 329; *U. S. v. Cornell*, 2 Mason, 91; *U. S. v. Wilson*, Bald., 78; *Jones v. State*, 2 Blackf., 475; *Martin v. State*, 16 Ohio, 364; *State v. Jewell*, 33 Me., 583.

⁶ R. S., 633, § 14.

⁷ 1 Bish. Cr. P., § 900; 2 Whart. Cr. L., § 3010.

versy, either from personal knowledge of the facts, from statements of witnesses, from the relation of the parties, or from rumor, he is not a competent juror if challenged;¹ even though he states on his oath that such opinion can be removed by evidence.² If, however, the juror has formed a hypothetical opinion merely, not fixed or settled, but depending upon the truth or falsity of statements made to him, of the truth of which he has no knowledge, opinion or belief, the juror is competent.³ Although, a juror states that he has not formed or expressed any opinion of the guilt or innocence of the accused, has no bias or prejudice, and can give him a fair trial, yet if he declares that he has read a public statement of a house breaking, and that if the accused was one of those named in the publication, he has an opinion of his guilt or innocence, not based upon any hypothesis of the truth of the publication, he is disqualified.⁴ The better opinion seems to be that if the juror has formed a fixed and settled opinion, he is incompetent though he has not expressed it.⁵ Where the

¹ *Noble v. People*, Breese, 29, 2d Ed., 54; *State v. Shelledy*, 8 Iowa, 477; *Gardiner v. People*, 3 Scam., 83; *Smith v. Eams*, 3 Scam., 76; *Venum v. Harwood*, 1 Gilm., 659; *People v. Marvin*, 4 Wen., 229; *People v. Mather*, 4 Wen., 22; *People v. Bodine*, 1 Denio, 281; *Sellers v. People*, 3 Cai., 414; *Schoeffler v. State*, 3 Wis., 824; *Baxter v. People*, 3 Gilm., 368; *Neeley v. People*, 13 Ills., 685; *Thomson v. People*, 24 Ills., 65; *Collins v. People*, 48 Ills., 145; *Gray v. People*, 26 Ills., 344; *Leach v. People*, 53 Ills., 311; *Ex parte Vermilyea*, 6 Cowen, 555; *Davis v. Walker*, 60 Ills., 452.

² *Collins v. People*, 48 Ills., 145; *People v. Mather*, 4 Wen., 230; *People v. Bodine*, 1 Denio, 286.

³ *Smith v. Eams*, 3 Scam., 76; *Gardiner v. People*, 3 Scam., 83; *Sellers v. People*, 3 Scam., 414; *Baxter v. People*, 3 Gilm., 376; *State v. Leight*, 17 Iowa, 28; *State v. Ostrander*, 18 Iowa, 451; *Leach v. People*, 53 Ills., 311; *People v. Fuller*, 2 Park. Cr. R., 16; *State v. Potter*, 18 Conn., 166; *Mann v. Glover*, 2 Green, 195; *Brown v. Com.*, Leigh, 769; *State v. Hinkle*, 6 Iowa, 380; *State v. Lawrence*, 38 Iowa, 51; *State v. Sater*, 8 Iowa, 424; *State v. Gillick*, 10 Iowa, 98; *contra*, *Nimble v. State*, 2 Greene Iowa, 404; *Gray v. People*, 26 Ills., 344.

⁴ *Gray v. People*, 26 Ills., 344; *Sam v. State*, 13 Sm. & M., 189; but see *State v. Thompson*, 9 Iowa, 188.

⁵ *Collins v. People*, 48 Ills., 145; *State v. Johnson*, 1 Walker, 391; *State v. Hewer*, 1 Walker, 318; *Armstead v. Com.*, 11 Leigh, 657; *Heath v. Com.*, 1 Robinson, 735; *Willis v. State*, 12 Ga., 444; *Maddox v. State*, 32 Ga., 581; *People v. Rathbun*, 21 Wen., 509; *Walsh's Case*, 2 Wallace, Jr., 143; *Spronce*

juror testified that he "had formed and expressed an opinion, but that he had no fixed opinion, none which could not be removed by evidence," it was held that he was incompetent.¹ The belief or opinion of the juror that he can do justice, though admissible in evidence as to his impartiality² can have but little influence in determining his competency,³ the presumption of law being against his competency when a decided opinion as to the guilt or innocence of the prisoner has been formed.⁴ If the juror has formed or expressed an opinion against the party, though from his knowledge of the cause or from statements made to or read by him, and not from any favor or ill-will, yet this is a principal cause for challenge.⁵ If the juror is able to respond to the question so as to satisfy his own conscience, "Is the prisoner guilty or innocent?" he is incompetent; but if from not being convinced of the existence or non-existence of certain facts, he is unable to determine that question, then he is competent.⁶ A juror who has talked with a witness whom he believed, but who has not formed any opinion of the prisoner's guilt or innocence, is

v. Com., 2 Va. Cas., 375; *State v. Godfrey*, Brayt., 170; *Williams v. State*, 12 Ga., 444; *Ned v. State*, 7 Porter, 187; *State v. Webster*, 13 N. H., 491; *Com. v. Knapp*, 9 Pick., 496; *State v. Wilson*, 1 Bald., 78; *contra*, *Noble v. People*, Breese, 29, 2d Ed., 54; *Boardman v. Word*, 3 Vt., 570; *Griffin v. State*, 15 Ga., 476; *Baker v. State*, 15 Ga., 498; *Hudgins v. State*, 2 Kelley, 173.

¹ *Cancemi v. People*, 2 Smith, 16 N. Y., 501; *People v. Mather*, 4 Wen., 229; *contra*, *State v. Lawrence*, 38 Iowa, 51.

² *Lohman v. People*, 1 N. Y., 384; *People v. Bodine*, 1 Denio, 281; *People v. Knickerbocker*, 1 Park. Cr. R., 302.

³ *Sam v. State*, 13 Sm. & M., 189; *Gray v. People*, 26 Ills., 344; *People v. Gehr*, 8 Cal., 359; *White v. Moses*, 11 Cal., 68; *Fouts v. State*, 7 Ohio N. S., 471; *contra*, *State v. Williams*, 3 Stewart, 454; *Moses v. State*, 10 Humph., 456; *Moran's Case*, 9 Leigh, 651; *State v. Ellington*, 7 Ired., 61; *Smith v. Com.*, 6 Grat., 696; *Brown v. Com.*, 11 Leigh, 769; *Hendrick v. Com.*, 5 Leigh, 708; *Montague v. Com.*, 10 Grat., 767.

⁴ *Sam v. State*, 13 Sm., & M. 189.

⁵ *Ex parte Vermilyea*, 6 Cowen, 555; *People v. Mather*, 4 Wen., 22; *contra*, *Rex v. Edmonds*, 4 Barn. & Ald., 471, 492; *State v. Fox*, 1 Dutch. N. J., 566; *State v. Spencer*, 1 Zab., 196; *Irvine v. Kean*, 14 Serg. & R., 292.

⁶ *Baxter v. People*, 3 Gilm., 368; *Gray v. People*, 26 Ills., 344; *State v. Thompson*, 9 Iowa, 188.

competent.¹ It is sufficient cause of challenge that the juror has formed an unqualified opinion, and the party making the challenge has a right to have the juror discharged without showing that the opinion was unfavorable to him.² It would be otherwise if it appeared affirmatively that the opinion was favorable to the party challenging.³ An impression, however, does not disqualify.⁴

§ 910. **Opinions which Disqualify a Juror.** — The holding by a juror of any opinions which may disqualify him from rendering a verdict in accordance with the laws of the land, is a disqualification.⁵ Therefore, if the juror has formed and holds such an opinion of the unconstitutionality of the statute on which the prosecution is founded, that if persisted in, he cannot convict the defendant, whatever the evidence may be;⁶ or states on his oath that no amount of circumstantial evidence would induce him to convict the defendant,⁷ or that he would not convict even if convinced of the prisoner's guilt,⁸ or has declared he would acquit any one the judge wanted him to convict,⁹ it is a good cause of challenge.

§ 911. **Challenge for Favor.** — Upon a challenge of a juror for favor, the question to be tried is whether he is altogether indifferent as to the parties, and also as to the issue as he stands unsworn;¹⁰ for he may even unconsciously to himself

¹ *Thomson v. People*, 24 Ills., 65.

² *State v. Shelledy*, 8 Iowa, 477; *People v. Williams*, 6 Cal., 206.

³ *State v. Benton*, 2 Dev. & Bat., 196.

⁴ *People v. Honeyman*, 3 Denio, 84; *Freeman v. People*, 4 Denio, 34; *People v. Symonds*, 22 Cal., 348.

⁵ *Pierce v. State*, 13 N. H., 536; *People v. Keyes*, 5 Cal., 347; *Gates v. People*, 14 Ills., 435.

⁶ *Com. v. Austin*, 7 Gray, 423; *Com. v. Abbott*, 13 Met., 120; *Com. v. Buzzell*, 16 Pick., 153.

⁷ *Gates v. People*, 14 Ills., 434.

⁸ *Id.*; *Chouteau v. Pierre*, 9 Mo., 3.

⁹ *Com. v. McFadden*, 11 Harris, 12.

¹⁰ *Co. Lit.*, 157b; 1 Bish. Cr. P., § 903; *Schoeffler v. State*, 3 Wis., 824; *Freeman v. People*, 4 Denio, 22; *Noble v. People*, Breese, 29, 2d Ed., 55; *People v. Horton*, 13 Wen., 8; *Gates v. People*, 14 Ills., 433; *Com. v. McFadden*, 11 Harris, 12; *People v. Bodine*, 1 Denio, 281; *People v. Lohman*, 2 Barb., 216.

be swayed to one side, and indulge his own feelings when he thinks he is influenced entirely by the weight of evidence. If he is in condition to do this he is not a competent juror.¹ The causes of challenge for favor are very numerous and dependent on a variety of circumstances.² Many of them are not sufficient causes for principal challenge.³ It has been held that upon a challenge for favor evidence is admissible to show that the prosecutor of an indictment has been lately entertained at the house of the juror;⁴ that the juror is a fellow servant with a party to the suit;⁵ that a party is a tenant of the juror;⁶ that the juror is indebted to the party;⁷ that the juror has formed a hypothetical opinion;⁸ that the juror has an impression as to the defendant's guilt or innocence;⁹ that the juror has given credit to written or oral statements as to the prisoner's guilt;¹⁰ or that the juror is biased or prejudiced against the defendant for any cause.¹¹

§ 912. **When Challenge may be Made.** — As a general rule, it is too late after the jury is impaneled to inquire into the impartiality of a juror;¹² but the court may in its discretion permit the juror to be challenged and set aside after the juror has been sworn, the panel completed and evidence has been given.¹³ A juror may be challenged for a favor after he has

¹ *Winneshiek Ins. Co. v. Schueller*, 60 Ills., 466; *Chicago & Alton R. R. Co. v. Adler*, 56 Ills., 344.

² 2 Whart. Cr. L., 3022.

³ *People v. Bodine*, 1 Denio, 281.

⁴ *Vent.*, 309; 3 *Salk.*, 81; *People v. Bodine*, 1 Denio, 305.

⁵ 1 *Chitty Cr. L.*, 544; 1 *Inst.*, 157b.

⁶ *Jenk. Cent.*, 141; *Odell v. Tyrell*, *Bulst. R.* pt. 20; *People v. Bodine*, 1 Denio, 306.

⁷ *Id.*

⁸ *People v. Bodine*, 1 Denio, 305; *State v. Benton*, 2 *Dev. & Bat.*, 212, 213; *Freeman v. People*, 4 *Denio*, 35.

⁹ *People v. Honeyman*, 3 *Denio*, 120; *Freeman v. People*, 4 *Denio*, 10.

¹⁰ *Id.*; *People v. Lohman*, 2 *Barb.*, 216.

¹¹ 2 Whart. Cr. L., § 3042; *People v. Bodine*, 281.

¹² *Com. v. Knapp*, 10 *Pick.*, 477; *Ward v. State*, 1 *Humph.*, 253.

¹³ *Stone v. People*, 2 *Scam.*, 326; and see *McFadden v. Com.*, 23 *Penn. S.*, 12; *People v. Damon*, 13 *Wen.*, 351; *Tooele v. Com.*, 11 *Leigh.*, 714; *U. S. v. Morris*, 1 *Curtis C. C.*, 23; *Com. v. Twombly*, 10 *Pick.*, 480; *Haynes v. Crutch-*

been challenged for principal cause, and such challenge has been tried and overruled,¹ but if he has consented to have his challenge for favor tried by the court, he cannot, after it has been tried and overruled then revoke his consent and have the challenge tried again by triers.²

§ 913. **Challenge, how Made.** — It has been held that it is not enough to say, I challenge for principal cause or for favor, and stop there, but that the cause of the challenge must be specified.³ Challenge for favor may be made orally.⁴

§ 914. **Challenges, how Tried.**—In the State of Illinois it has usually been the practice for the judge to hear all objections which are made against jurors, and decide them himself, without considering whether they were objections in the nature of a challenge for principal cause or challenge to the favor.⁵ But according to the common law when the facts on which a challenge for favor rests are disputed the proper course is to submit the question to triers to settle the issue of fact;⁶ but if neither of the parties ask for triers and submit their evidence to the judge, and take his determination thereon, they cannot object to his competency to decide that issue.⁷ When a challenge to a juror for favor is made, if it

field, 7 Ala., 189; *McGuire v. State*, 37 Missis., 369; *Delworth v. Com.*, 12 Grat., 689; *Com. v. Knapp*, 10 Pick., 477; *contra*, 1 Arch. C. P. & Pl., 543; *Reg. v. Wardle, C. & M.*, 647; *Grable v. State*, 2 Greene Iowa, 559.

¹ *Carnal v. People*, 1 Park. Cr. R., 272; *Freeman v. People*, 4 Denio, 9.

² *People v. Rathbun*, 21 Wen., 540.

³ 1 Arch. C. P. & Pl., 555; *Freeman v. People*, 4 Denio, 31; *Mann v. Glover*, 2 Green N. J., 195; *Schoeffler v. State*, 3 Wis., 824.

⁴ *People v. Bodine*, 1 Denio, 308.

⁵ *Winnesheik Ins. Co. v. Schueller*, 60 Ills., 473; *Rollins v. Ames*, 3 N. H., 350.

⁶ 1 Arch. C. P. & Pl., 544, 556; *Rex v. Dolby*, 1 Car. & K., 238; *People v. Mather*, 4 Wen., 231; *People v. Bodine*, 1 Denio, 281; *People v. Rathbun*, 21 Wen., 509; *Schoeffler v. State*, 3 Wis., 822; *Williams v. State*, 3 Kelley, 453; *Carnal v. People*, 1 Park. Cr. R., 272; *People v. Dewick*, 2 Park., 230; 12 Amer. Juris., 337; *Vananker v. Beemer*, 1 Southard, 364; *Hooks v. Paige*, 1 Tenn., 260; *Minna v. Hepburn*, 7 Cranch, 290; *contra*, *Rollins v. Ames*, 2 N. H., 350; *Boardman v. Wood*, 3 Vt., 570; *State v. Benton*, 2 Dev. & Bat., 196.

⁷ *People v. Mather*, 4 Wen., 231; *People v. Rathbun*, 21 Wen., 509; *Peo-*

is before any of the jurors are sworn, the court may select the triers;¹ if two are sworn they may try;² and if they try one and find him indifferent and he is sworn, then he and the two triers may try another; and if he be found indifferent and sworn, then the two triers cease and the two that have been found indifferent and sworn must try the rest.³ If the two triers cannot agree the challenge must be retried, and for this purpose the court may select the triers and should select those first who are first sworn.⁴

§ 915. Juror may be Sworn as to his Competency.—Where a juror is challenged for principal cause or for favor the juror himself may be sworn as a witness before the court, or the triers to state or explain any facts which do not impeach his character or motives.⁵ But if the cause of challenge tend to his infamy or disgrace he cannot be examined on oath respecting it. The challenge must, in such case, be supported by extrinsic proof.⁶

FORM OF OATH TO JUROR AS TO HIS COMPETENCY.

You do solemnly swear (*by the ever-living God*) that you will true answer make to such questions as may be put to you touching your competency to serve as a juror in this cause (*or "touching the challenge exhibited against you"*); so help you God.

ple v. Honeyman, 3 Denio, 121; People v. Doe, 1 Mann Mich., 451; Steward v. State, 8 Engl. 13 Ark., 720.

¹ 1 Arch. C. P. & Pl., 544.

² McDuffie v. State, 17 Ga., 497.

³ 2 Whart. Cr. L., 3038.

⁴ People v. Dewick, 2 Park. Cr. R., 230.

⁵ 2 Whart. Cr. L., 3010, Co. Lit., 158; 1 Salk., 153; 1 Arch. C. P. & Pl., 557; People v. Fuller, 2 Park., 16; Mechanics and Farmers' Bank v. Smith, 19 John., 115; State v. Benton, 3 Dev. & Bat., 196; Epps v. State, 19 Ga., 102; Com. v. Knapp, 9 Pick., 496; Jewell v. Com., 10 Harris, Penn., 94; Montague v. Com., 10 Grat., 767.

⁶ 2 Whart. Cr. L., § 3039; Hudson v. State, 1 Blackf., 317; Lohman v. People, 2 Barb., 216; 1 N. Y., 385; Respublica v. Dennie, 4 Yeates, 267; Rex v. Edmonds, 4 Barn. & Ald., 471; but see 1 Bish. Cr. P., § 934.

FORM OF OATH OF TRIERS.¹

You do solemnly swear (*by the ever-living God*) that you will well and truly try whether E. F. (*the juryman challenged*) stands indifferent between the people of the state of Illinois and the prisoner at the bar, and also upon the issue joined in the cause; and a true verdict will give according to the evidence;² so help you God.

§ 916. **Objections to Jurors, how Waived.**—If the parties know or can ascertain the cause of challenge of a juror and do not take it at the proper time while the jury is being impaneled they cannot avail themselves of the defect afterwards.³ Therefore the objection that the juror is an alien,⁴ is over sixty years of age,⁵ is biased or prejudiced,⁶ is interested,⁷ was one of the grand jury that found the indictment against the defendant,⁸ is waived if not made before the juror is impaneled and sworn.⁹ But the failure of the defendant to object to a juror on the ground of incompetency does not operate as a waiver of the objection unless it appears affirmatively that he knew or had the means of knowing of the incompetency.¹⁰ It has been held that if a juror prejudice a cause and it is unknown to the failing party in time to challenge it is a good cause for a new trial.¹¹

¹ 2 Whart. Cr. L., § 3039; 1 Arch. C. P. & Pl., 557; *People v. Rathbun*, 21 Wen., 542; *Clark v. Ostrander*, 1 Cowen, 441.

² The triers should be sworn to find, not only that the juror is indifferent as to the issue, but also as to the parties. *Freeman v. People*, 4 Denio, 22; *contra*, *State v. Spencer*, 1 Zab., 196.

³ 1 Bish. Cr. P., § 932; 1 Arch. C. P. & Pl., 512; *Chase v. People*, 40 Ills., 357; *Van Blaricum v. People*, 16 Ills., 364; *Bradshaw v. Hubbard*, 1 Gilm., 390; *Wickersham v. People*, 1 Scam., 128.

⁴ *Chase v. People*, 40 Ills., 356; *Greenup v. Stocker*, 3 Gilm., 222; *contra*, *Guykowski v. People*, 1 Scam., 476; *Stone v. People*, 2 Scam., 326.

⁵ *Davis v. People*, 19 Ills., 74; *Murphy v. People*, 37 Ills., 447.

⁶ *State v. Groom*, 10 Iowa, 308; *Van Blaricum v. People*, 16 Ills., 364.

⁷ *Bradshaw v. Hubbard*, 1 Gilm., 390.

⁸ *Wickersham v. People*, 1 Scam., 128; but see *Dilworth v. Com.*, 12 Grat., 689.

⁹ 1 Bish. Cr. P., § 922.

¹⁰ *State v. Groom*, 10 Iowa, 309; *Venum v. Harwood*, 1 Gilm., 663; *Dilworth v. Com.*, 12 Grat., 689; *State v. Burnside*, 37 Mo., 343; *Com. v. Wade*, 17 Peck., 395; *Rex v. Hunt*, 4 Barn. & Ald., 430.

¹¹ *Sellers v. People*, 3 Scam., 412; *State v. Funk*, 17 Iowa, 366; *Nomaque v. People*, *Breese*, 109, 2d Ed., 145; but see 2 Whart. Cr. L., § 3033, n. j.

§ 917. **When Overruling Objection to a Juror Error.**—Where a juror on the trial is objected to for cause, and the objection is overruled, to which the prisoner excepts and afterwards challenges the juror peremptorily, he is entitled to the benefit of the exception.¹ Where the juror is challenged for favor and not for principal cause, the decision of the circuit court is not final, but will be reviewed on error.²

§ 918. **Peremptory Challenges.**—The statute provides that “every person arraigned for any crime punishable with death or imprisonment in the penitentiary for life shall be admitted on his trial to a peremptory challenge of twenty jurors, and no more; and every person arraigned for any offense that may be punished by imprisonment for a term exceeding eighteen months, shall be admitted to a peremptory challenge of ten jurors; and in all other criminal trials the defendant shall be allowed a peremptory challenge of six jurors. The attorney prosecuting on behalf of the people shall be admitted to a peremptory challenge of the same number of jurors that the accused is entitled to.”³

§ 919. **Continued — Decisions.** — When several persons are jointly indicted and tried, each is entitled to the same number of challenges as he would be if he had been tried alone,⁴ and neither has a right to complain of a challenge by another.⁵ The prevailing opinion is that the prisoner’s right to a peremptory challenge is waived when the juror is passed over

¹ *Baxter v. People*, 3 Gilm., 368, 376; *People v. Bodine*, 1 Denio, 281; *contra*, *Freeman v. People*, 4 Denio, 10; *People v. Knickerbocker*, 1 Park. Cr. R., 302; *McGowan v. State*, 9 Yerg, 134; *Stewart v. State*, 13, Ark. 720, and see *St. L. & S. E. R. W. Co. v. Lux*, 63 Ills., 524.

² *Winnesheick Ins. Co. v. Schueller*, 60 Ills., 467.

³ *R. S.*, 411, § 432. Where the court sustains a motion by the state’s attorney to discharge a juror after he has been accepted by the prisoner, such action may be referred to the right of peremptory challenge if such right has not been exhausted. *Mingia v. People*, 54 Ills., 274.

⁴ *Schoeffler v. State*, 8 Wis., 823; *Washington v. State*, 17 Ills., 147; *Buster v. State*, 26 Ala., 107; *State v. Monquas*, T. U. P. Charlt., 16; *Maton v. People*, 15 Ills., 537; *contra*, *Bibb v. Reid*, 3 Ala., 88.

⁵ *State v. Smith*, 2 Ired., 402; *U. S. v. Marchant*, 4 Mason, 160; 12 Wheat, 480.

to the court or to the prosecution;¹ though it has been held that the right of the accused to challenge a juror peremptorily remains open until the juror is sworn.² It is clear that the right ceases when the panel is complete, accepted and sworn.³

§ 920. **Who may be Sworn as Jurors.** — It is a ground of error for a juror of a name different from the one furnished the prisoner to be sworn upon the panel. The persons named on the sheriff's return, and those only unless challenged, can be sworn as jurors.⁴

§ 921. **Swearing the Jury.** — After all of the challenges have been made, and a full jury of unexceptionable persons obtained, they must be sworn.⁵ If several causes are to be left to the same jury, the jurors must be sworn in each case.⁶ It is not sufficient at the commencement of the term to call up all the jurors composing the panel, and swear them to try all the causes which may be submitted to them during the term, but they must be sworn for the trial of each particular case.⁷ Where through inadvertence or otherwise some or all of the jurors are sworn before the defendant's plea has been entered, a refusal to have the jurors re-sworn at the request of the defendant would be a ground for reversal of the judgment should it be against him; but the objection for such irregularity will be waived if not made at the time of the trial, and cannot be made available on error.⁸

FORM OF OATH OF JURORS.

You and each of you do swear by the ever-living God⁹ (*or* "*you do sol-*

¹ *Com. v. Rogers*, 7 Met., 500; *State v. Potter*, 18 Conn., 166.

² *Hooker v. State*, 4 Ohio, 348; *Morris v. State*, 7 Blackf., 607; *Wyatt v. State*, 8 Blackf., 507; *Hendrick v. Com.*, 5 Leigh, 708; *Spencer v. DeFrance*, 3 Greene Iowa, 216; *Com. v. Knapp*, 9 Pick., 496.

³ *State v. Cameron*, 2 Chand., 172; *Spencer v. De France*, 3 Greene Iowa, 216.

⁴ *Mingia v. People*, 54 Ills., 274.

⁵ 1 Chitty Cr. L., 550.

⁶ *Kitter v. People*, 25 Ills., 42.

⁷ *Barney v. People*, 22 Ills., 160.

⁸ *Vezain v. People*, 40 Ills., 397.

⁹ These words are authorized by statute. R. S., 725, § 3.

emphly, sincerely declare and affirm"¹), that² you will well and truly try the issue³ (or "*issues*") between the people of the state of Illinois, and the prisoner at the bar in the cause now in hearing, and a true verdict give according to law⁴ and evidence unless discharged by the court.⁵

§ 922. **Trial of Several Causes by the same Jury.**—If several causes are by agreement to be left to the same jury, the jurors must be sworn in each case and a separate record must be kept of the finding, and a separate judgment should be entered on each finding.⁶

§ 923. **Disposition of the Jury During the Trial.**—When the jury are impaneled, that is, selected and sworn,⁷ they will take their seats together and hear the proofs and allegations in the case.⁸ In capital cases from the commencement of the trial till the rendition of the verdict, the jury during all of the adjournments of the court should, when out of the presence of the court, be placed in charge of an officer specially sworn, unless it is otherwise ordered by the court, by the consent of

¹ These words may be used when the juror has conscientious scruples against taking an oath. R. S., 725, § 4.

² The words "the truth to speak on the issue joined," *Warren v. State*, 1 Greene Iowa, 106; *Harriman v. State*, 2 Greene Iowa, 270; and the words "to say the truth in the premises," *Patterson v. State*, 2 Engl., 59; have respectively been held insufficient. 1 Arch. C. P. & Pl., 541.

³ Where there are two or more counts to which there are pleas and issue it is error to impanel and swear the jury to try the issue to one count only. *Adams v. State*, 6 Engl. Ark., 466.

⁴ In the state of Illinois the jurors, being the judges of the law as well as of the facts. R. S., 411, § 431; *Schnier v. People*, 23 Ills., 17; *Fisher v. People*, 23 Ills., 283, 294; must be sworn to try the cause according to both. *Patterson v. State*, 2 Engl. Ark., 59; *Eyman v. People*, 1 Gilm., 4. Where the jurors are judges of only the facts, it is sufficient if they are sworn to render a true verdict "according to the evidence." *State v. Jones*, 5 Ala., 666.

⁵ Objections to the form of the oath are waived if not made at the time the oath is taken. *Edwards v. Edwards*, 31 Ills., 474; *Cornelius v. Boucher*, Breese, 13, 2d Ed., 32.

⁶ *Kitter v. People*, 25 Ills., 42.

⁷ 1 Bish. Cr. P., § 960, n. 3; *State v. Ostrander*, 18 Iowa, 435; *Wilson v. State*, 31 Ala., 371.

⁸ 1 Arch. C. P. & Pl., 542.

the accused and the attorney for the people.¹ In such case if the jury separate without the consent of the prisoner, the court must grant a new trial, unless such separation was the result of misapprehension, accident or mistake on the part of the jury and under circumstances to show that such separation could by no possibility have resulted to the prejudice of the prisoner.² In cases of felonies not capital³ and of misdemeanors the rule is different, for in such cases the misconduct of an officer in allowing the jury to separate, there being no undue influence shown on the jury, is not a cause for setting aside the verdict.⁴ In these cases the court may exercise a discretion as to the proper disposition of the jury during the progress of the trial.⁵ When such separation is permitted, the judge ought to caution the jury against holding conversations with any persons respecting the cause or suffering it in

¹ *McKinney v. People*, 2 Gilm., 553; *Jumpretz v. People*, 21 Ills., 411; *Gibbons v. People*, 23 Ills., 518; *People v. McIntyre*, 38 Ills., 518; *Lewis v. People*, 44 Ills., 452; *Nomaque v. People*, Breese, 109, 2d Ed., 145.

² *Nomaque v. People*, Breese, 109, 2d Ed., 145; *McKinney v. People*, 2 Gilm., 553; *Jumpretz v. People*, 21 Ills., 411; *Russel v. People*, 44 Ills., 509; *McLean v. State*, 8 Mo., 153; *State v. Godfrey*, Brayt., 170; *Quinn v. State*, 14 Ind., 589; *Cornelius v. State*, 7 Engl., 782; *Coker v. State*, 20 Ark., 53; *State v. Miller*, 1 Dev. & Bat., 500; *Roberts v. State*, 14 Ga., 8; *Maher v. State*, 3 Minn., 444; *Keenan v. State*, 8 Wis., 132; *State v. Prescott*, 7 N. H., 287; *contra*, Opinion of Breese, J., in *Jumpretz v. People*, 21 Ills., 422; *Reins v. People*, 30 Ills., 273; *Miller v. People*, 39 Ills., 467; *Adams v. People*, 47 Ills., 381; *Stephens v. People*, 4 Park. Cr. R., 396; 19 N. Y., 549; *State v. Babcock*, 1 Conn., 40; *State v. Feller*, 25 Iowa, 67; *State v. Gillick*, 10 Iowa, 98; *Com. v. McCaul*, 1 Va. Cas., 271; *People v. Douglass*, 4 Cowen, 34; *Smith v. Thompson*, 1 Cowen, 221, and note 1 Bish. Cr. P., 999, n. 4.

³ *Miller v. People*, 39 Ills., 459; *McCreary v. Com.*, 5 Casey, 327; *contra*, 1 Arch. C. P. & Pl., 586; *McLean v. State*, 8 Mo., 153; *Berry v. State*, 10 Ga., 511; *Wiley v. State*, 1 Swan Tenn., 256.

⁴ *McKinney v. People*, 2 Gilm., 553; *Reins v. People*, 30 Ills., 273; *contra*, *State v. Populus*, 12 Lou. An., 710.

⁵ *McKinney v. People*, 2 Gilm., 553; *Reins v. People*, 30 Ills., 274; *Rex v. Woolf*, 18 Engl. Cr. L., 117; *State v. Igo*, 21 Mo., 461; *State v. Weber*, 22 Mo., 324; *Com. v. Roby*, 12 Pick., 496; *Bebee v. People*, 5 Hill, 32; 2 Blackf., 114; 2 Carter Ind., 435; 11 Ohio, 471; 2 Strob. S. C., 178; 2 Richardson S. C., 119.

their presence or reading newspaper reports or comments regarding it and the like.¹

§ 924. **Separation of Jury by Consent.**—It has been held to be error to ask a prisoner in a capital case to consent to the separation of the jury and that if asked and granted or even granted without being asked, it would avail nothing, for the reason that his refusal to accommodate the jury might excite a feeling of hostility to him.² But in this state the courts will probably hold that it is competent for the judge with the consent of the accused to permit the separation of the jury during the progress of a trial; and that a conviction will not be vitiated thereby unless the separation is shown to be accompanied with some abuse prejudicial to the accused.³ In cases not capital the verdict will not be set aside on account of the separation of the jury if with the consent of the defendant.⁴

§ 925. **Officer Attending Jury in the Absence of the Court to be Sworn.**—In criminal cases the jury should, when out of the presence of the court, be placed in charge of an officer specially sworn.⁵ If, however, the officer is not in fact properly sworn, it has been held that the prisoner must object to the irregularity at the time, and if not corrected by the court take a bill of exceptions.⁶

FORM OF OATH OF OFFICER ATTENDING THE JURY DURING THE TRIAL.⁷

You do swear by the ever-living God (*or "you do solemnly, sincerely and truly declare and affirm"*) that you will well and truly keep this jury, and neither speak to them yourself nor suffer any other person to speak to them, touching the matter relative to this trial.

¹ Bish. Cr. P., § 996; 1 Arch. C. P. & Pl., 587.

² Wesley v. State, 11 Humph., 502; Berry v. State, 10 Ga., 511; Wiley v. State, 1 Swan Tenn., 256; People v. Backus, 5 Cal., 275; Peiffer v. Com., 3 Harris Pa., 468.

³ Stephens v. People, 19 N. Y., 549; Adams v. People, 47 Ills., 381; State v. Mix, 15 Mo., 153; Friar v. State, 3 How. Missis., 422; Quinn v. State, 14 Ind., 589.

⁴ Reins v. People, 30 Ills., 256; Miller v. People, 39 Ills., 459; *contra*, State v. Populus, 12 Lou. An., 710.

⁵ Gibbons v. People, 23 Ills., 518.

⁶ Holmes v. People, 5 Gilm., 480; McKinney v. People, 2 Gilm., 541; Morton v. People, 47 Ills., 468.

⁷ 1 Arch. C. P. & Pl., 586.

§ 926. **Penalty for Violating Oath Taken by the Officer Attending the Jury.** — The statute provides that “if any officer sworn to attend upon a jury shall knowingly violate his oath or affirmation, or shall so negligently perform his duty that the jury shall separate without the leave of the court, or obtain food or drink (except water), or if any person not belonging to the jury shall hold conversation with any of the jury, every person and officer so offending shall be punished for a contempt of the court by fine or imprisonment, or both, in the discretion of the court.”¹

¹ R. S., 411, § 436.

SECTION VIII.

THE TRIAL.

- § 927. Separate Trial.
- 928. Public Trial.
- 929. Provisions of the Statute as to the Mode of Procedure on the Trial.
- 930. Separation of Witnesses.
- 931. The Openings of the Respective Counsel.
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1. MISCELLANEOUS MATTERS INCIDENT TO THE TRIAL.

§ 927. **Separate Trial.**—Where several persons are jointly indicted they cannot, as a matter of right, have separate trials. This allowance is in the discretion of the court and cannot be assigned for error.¹

§ 928. **Public Trial.**—By the constitution persons accused of crime are entitled to a public as well as an impartial trial;² but to prevent noise and disturbance, the court may order the doors of the court-room closed where ingress or egress are not prevented. This does not render the trial private.³

§ 929. **Provisions of the Statute as to the Mode of Procedure on the Trial.**—"All trials for criminal offenses shall be conducted according to the course of the common law, except when this act points out a different mode, and the rules of evidence of the common law shall also be binding upon all courts and juries in criminal cases except as otherwise provided by law."⁴

§ 930. **Separation of Witnesses.**—The court may on motion of either party exclude from the room where the court is held all the witnesses except the one under examination.⁵ This separation of the witnesses is not a thing of absolute right to be demanded by the prisoner, for the court may refuse to grant the motion for the separation,⁶ though it is pretty much a matter of course to grant it.⁷ If the witness fails to obey the order of exclusion, it is within the discretion of the court

¹ *Maton v. People*, 15 Ills., 537; *Johnson v. People*, 22 Ills., 315; *U. S. v. Merchant*, 12 Wheat., 480; *State v. Nash*, 7 Iowa, 348; *State v. Marvin*, 12 Iowa, 499; *State v. Gigher*, 23 Iowa, 318; *State v. Hunter*, 33 Iowa, 361; *Com. v. Thompson*, 108 Mass., 461; *Com. v. Jones*, 99 Mass., 438; *ante* § 79.

² R. S., 60, Const., Art. II., § 9.

³ 1 Bish. Cr. P., §§ 957-959; *Cooley Con. Lim.*, 312; *Stone v. People*, 2 Scam., 326.

⁴ R. S., 410, § 428.

⁵ *People v. Green*, 1 Park., 11; *Johnson's Case*, Foster, 46; *State v. Zellers*, 2 Halst., 220; *People v. Duffy*, 1 Wheel. C. C., 123.

⁶ *Errissman v. Errissman*, 25 Ills., 136; *Vaughan's Case*, Holt, 689; *State v. Fitzsimmons*, 30 Mo., 236; *Thomas v. State*, 27 Ga., 237; *People v. Garnett*, 29 Cal., 622; *Nelson v. State*, 2 Swan, 237.

⁷ *Reg. v. Murphy*, 8 Car. & P., 297; *Johnson v. State*, 14 Ga., 55.

to admit the testimony of such witness or to exclude it.¹ An order may forbid the witnesses who have been examined from holding conversation with the other witnesses previous to the examination of the latter.²

2. OPENINGS OF COUNSEL.

931. **The Openings of the Respective Counsel.**—When the jury are impaneled and have taken their seats, the counsel for the prosecution opens the case to the jury unless the defendant has the affirmative of the issue, in which case the defendant or his counsel has the right to make the first statement of the case to the jury.³ The counsel for the prosecution in opening the case usually states the outline of the indictment and the pleadings thereon,⁴ giving the jury fully and clearly to understand the question in issue which they are to determine, and then states the facts which he expects to prove with all of the circumstances of the case as they will probably appear from the evidence to be adduced and its application to the points in issue and the principles of law governing the same. He may, if he deems it advisable, state what the defendant will probably prove and what evidence he will give in reply to the evidence of the defendant, with such comments as he thinks proper to make, so that the jury may at the commencement of the trial have a full and complete understanding of the case and be better prepared to understand the evidence in all of its bearings.⁵ In opening the case the counsel has no right to state facts which he knows are immaterial or inadmissible in evidence and cannot be proved, and the court should not allow or

¹ *Sartorius v. State*, 24 Missis., 602; *State v. Sparrow*, 2 Murphy, 487; *Parker v. McWilliams*, 6 Bing., 683; *Com. v. Hersey*, 2 Allen, 173, 176; *Rex v. Colley, Moody & M.*, 329; *Rex v. Brown*, 4 Car. & P., 588; *Laughlin v. State*, 18 Ohio, 99; *Montgomery v. State*, 40 Ala., 684; *Jackson v. State*, 14 Ind., 327.

² *Pleasant v. State*, 15 Ark., 624.

³ *Harvey v. Ellethorpe*, 26 Ills., 418; *Marshall v. American Express Co.*, 7 Wis., 1; *Huddle v. Martin*, 54 Ills., 258; *Kells v. Davis*, 57 Ills., 261.

⁴ 1 Chitty Cr. L., 554.

⁵ Putb. Pr., 463; *U. S. v. Mingo*, 2 Curtis C. C., 1.

permit him to do so.¹ The counsel for the defendant then usually opens the case for his client, although he may waive the statement of his defense until the opposite party has rested his case.² Where the counsel for several persons cannot agree as to the order in which they are to address the jury, the court will call upon them, not in the order of their seniority, but in the order in which the names of the defendants stand in the indictment. But where the counsel for one prisoner has witnesses to certain facts to examine, the counsel for another cannot be allowed to postpone his address to the jury until after those witnesses have been examined.³ The order of opening the case to the jury is a matter of practice within the control of the judge, and the appellate court will not interfere unless there is a clear abuse of discretion to the injury of the party complaining.⁴

3. PRESENCE OF PRISONER.

§ 932. When Necessary.—In a case of treason, felony⁵ or misdemeanor punishable by imprisonment,⁶ or by corporal

¹ *Reg. v. Beard*, 8 Car. & P., 142; *Reg. v. Butcher*, 2 Moody & Ry., 228; *Rex v. Orvell*, 1 Moody & Ry., 467; *Rex v. Davis*, 7 Car. & P., 785; *Rex v. Hartell*, 7 Car. & P., 773; *Rex v. Swatkins*, 4 Car. & P., 548; *People v. White*, 14 Wen., 111, 114, 115.

² *Putb. Pr.*, 464; 1 *Chitty Cr. L.*, 623.

³ *Roscoe Cr. Ev.*, 235; *Reg. v. Barber*, 1 Car. & K., 434.

⁴ *Marshall v. American Express Co.*, 7 Wis., 1; *Central Bank v. St. John*, 17 Wis., 163; *Savings Bank v. Shakman*, 30 Wis., 333; *Huddle v. Martin*, 54 Ills., 258; *Kells v. Davis*, 57 Ills., 261.

⁵ 1 *Chitty Cr. L.*, 411; *Holliday v. People*, 4 Gilm., 111; *Prine v. Com.*, 6 Harris Pa., 103, 104; *Clark v. State*, 4 Humph., 254; *People v. Perkins*, 1 Wen., 91; *State v. Hughes*, 2 Ala., 102; *State v. Buckner*, 25 Mo., 167; *Andrews v. State*, 2 Sneed, 550; *Stance v. France*, 1 Tenn., 434; *Cole v. State*, 5 Engl., 318; *Sneed v. State*, 5 Pike, 431; *State v. Cross*, 27 Mo., 332; *Safford v. People*, 1 Park. Cr. P., 477, *Anon.*, 31 Me., 592.

⁶ *People v. Winchell*, 7 Cowen, 525; *State v. Hurlbut*, 1 Root, 90; *Price v. State*, 36 Missis., 531; *Hamilton v. Com.*, 4 Harris Pa., 129; *Gibson v. State*, 39 Ala., 693; *Graham v. State*, 4 Ala., 659; *Safford v. People*, 1 Park., 477; *Rex v. Harwood*, 2 Stra., 1088; *contra*, *Hughes v. State*, 4 Iowa, 555; *Holliday v. People*, 4 Gilm., 114.

punishment,¹ the prisoner, unless on bail² or intentionally absent,³ must be present, or has the right to be present during the whole of the trial, including the giving in of the evidence, the rendition of the verdict,⁴ and the receiving of the sentence.⁵ If, however, the offense is for the violation of an ordinance,⁶ or a misdemeanor punishable only by a fine,⁷—or if punishable by both fine and imprisonment, a fine only is to be imposed,⁸—it is not essential for the prisoner to be present at the time of the trial¹⁰ or of the reception of the verdict,⁵ or of the sentence¹¹ and rendition of the judgment. All the authorities agree in holding that every person tried for treason or a felony has a right to be present at the trial, and at the whole of it, and if he should be deprived of this right without his consent it would be erroneous.¹² But some of the authorities hold that the prisoner may waive this right.¹³

¹ *Son v. People*, 12 Wen., 344; *Reg. v. Templeman*, 1 Salk., 56; *Rex v. Duke*, 1 Salk., 400; *People v. Taylor*, 3 Denio, 98; *Rex v. Han*, 3 Bur., 1786; *Rex v. Harris*, 1 Ld. Raym., 267; *Rex v. Harrison*, 12 Mod., 156; *Perry v. People*, 14 Ills., 500.

² *Fight v. State*, 7 Ohio pt., 1, 180; *State v. Wamire*, 16 Ind., 357; *Price v. State*, 36 Missis., 531; *Canada v. Com.*, 9 Dana, 304; *contra*, *Sneed v. State*, 5 Pike, 431; *People v. Winchell*, 7 Cowen, 525; *State v. Hurlbut*, 1 Root, 90.

³ *Hill v. State*, 17 Wis., 677; *People v. Bealoba*, 17 Cal., 389; *Holliday v. People*, 4 Gilm., 114; *City of Bloomington v. Heiland*, 67 Ills., 280.

⁴ *State v. Shepard*, 10 Iowa, 126; *Nomaque v. People*, Breese, 109, 2d Ed., 145.

⁵ *Rose v. State*, 20 Ohio, 31; *Cole v. State*, 5 Engl. Ark., 318.

⁶ *City of Bloomington v. Heighland*, 67 Ills., 280.

⁷ *Reg. v. Templeman*, 1 Salk., 55; *Son v. People*, 12 Wen., 344; *Ex parte Tracy*, 25 Vt., 93; *Hughes v. State*, 4 Iowa, 554; *State v. Buhs*, 18 Mo., 318; *Holliday v. People*, 4 Gilm., 111.

⁸ *People v. Taylor*, 3 Denio, note; *Com. v. Crump*, 1 Va. Cas., 172.

⁹ *Ex parte v. Tracy*, 25 Vt., 93; *Warren v. State*, 19 Ark., 214; *U.S. v. Leckie*, Sprague, 227; *U. S. v. Mayo*, 1 Curt. C. C., 433, 434; *Sweeden v. State*, 19 Ark., 205; *State v. Joiner*, 16 Vt., 497; *City of Bloomington v. Heighland*, 67 Ills., 280; but see *People v. Petry*, 2 Hilton, 523.

¹⁰ *Holliday v. People*, 4 Gilm., 111.

¹¹ 1 Bish. Cr. P., § 275.

¹² *Rose v. State*, 20 Ohio, 31; *Rex v. Streek*, 2 Car. & P., 413.

¹³ *Hill v. State*, 17 Wis., 675; *Rex v. Constable*, 7 Dowl. & Ry., 683; 3 Barn & Ald., 659, note.

while others hold he cannot.¹ Where a justice of the peace issued a criminal warrant and the officer, instead of arresting the defendant upon it, read it to him and made a return thereon, "Served by reading," etc., and on the next day the father, by authority of the defendant, appeared before the justice with counsel and objected to proceeding with the trial in the absence of the defendant and then left the room, but the justice proceeded with the case, convicted the defendant, and imposed a fine upon him for which a judgment was rendered, it was held that the judgment was a nullity and no defense to an action of trespass, assault and battery and false imprisonment against the justice for the arrest of the defendant on process issued on such judgment.²

§ 933. **Presence of the Defendant at Making and Hearing Motions.**—The prisoner has a right to be present whenever any step is taken in the cause in which he is defendant.³ If a motion is made in his absence it is error unless it appears affirmatively that he was not prejudiced thereby.⁴ Probably this right to be present on the hearing of a motion may be waived either by the prisoner or his counsel.⁵ Upon error the personal presence of the prisoner is not necessary to give jurisdiction, nor is it a legal right. He may assign error and judgment may be rendered in his absence.⁶

4. EVIDENCE.

§ 934. **Order of Giving the Evidence.**—The order of giving

¹ *Prine v. Com.*, 6 Harris Pa., 103; *Rex v. Streek*, 2 Car. & P., 413.

² *Bigelow v. Sterns*, 19 John., 39; *Reg. v. Simpson*, 10 Mod., 248, 250.

³ *Hooker v. Com.*, 13 Grat., 763; *Fight v. State*, 7 Ohio, pt., 1, 180; *Dunn v. Com.*, 6 Barr, 384; *State v. Craton*, 6 Ired., 164; *Sneed v. State*, 5 Pike, 431; *State v. Wamire*, 16 Ind., 357.

⁴ *Wheeler v. State*, 14 Ind., 573; *Hall v. State*, 40 Ala., 698.

⁵ *Jewel v. Com.*, 10 Harris Pa., 94, 101, 102; *Reg. v. Parkinson*, 2 Den. C. C., 459, 6 Eng. L. & Eq., 352; *Rex v. Boltz*, 8 Dowl. & Ry., 65; *Rex v. Hollingberry*, 6 Dowl. & Ry., 344; 4 B. & Cres., 329; *People v. Van Wyck*, 2 Cai., 333; *contra*, *Rex v. Scully*, 1 Alcock & Napier, 262; *Reg. v. Candwell*, 17 Q. B., 503; *People v. Freer*, 1 Cai., 485; 6 Eng. L. & Eq., 352; *Rex v. Spragg*, 2 Bur., 928.

⁶ *Donnelly v. State*, 2 Dutcher, 463, 601; *People v. Clark*, 1 Park. Cr. R., 360.

the evidence and the manner of conducting the trial are substantially the same in criminal cases as in civil, which has been fully considered in another work,¹ and therefore need not be repeated here. After the evidence has been declared closed, the court may in its discretion receive additional evidence² even after the arguments of counsel and the judge's charge are closed³ and a verdict of the jury has been delivered to the clerk,⁴ but this cannot be demanded as of right,⁵ and as a general practice should not be allowed.⁶

§ 935. **Objections to Evidence.**—If an objection to evidence which can be obviated by further proof be not specifically made on the trial it will not avail as a ground for a new trial⁷ or reversing the judgment,⁸ for if the best proof of a fact is not adduced the party by not objecting to the secondary evidence and pointing out what would be better, so as to give the other party an opportunity to produce it, waives his right to such evidence.⁹

§ 936. **Objections which can be Obviated.**—An objection which can be obviated by further proof cannot be made available on error unless the question is preserved by a bill of exceptions showing that the objection was taken at the proper time and an exception then taken to the ruling of the court in not sustaining such objection.¹⁰

¹ Moore's Civil Pr., §§ 556-571.

² *Welsh v. People*, 17 Ills., 339; *Hoskins v. State*, 11 Ga., 92; *Katte v. People*, 4 Park. Cr. R., 591; *Reed v. State*, 23 Ga., 190.

³ *Dave v. State*, 22 Ala., 23.

⁴ *Burke v. Com.*, J. J. Marsh, 675.

⁵ *Nicholson's Case*, 2 Lewin, 151.

⁶ 1 Bish. Cr. P., § 966; *Mary v. State*, 5 Mo., 71, 81.

⁷ *Gilham v. State Bank of Illinois*, 2 Scam., 245; *Id.*, 248.

⁸ *Stone v. Great West. Oil Co.*, 41 Ills., 86; *Graham v. Anderson*, 42 Ills., 515; *Howell v. Edmonds*, 47 Ills., 79; *Mosier v. Kreigh*, 49 Ills., 84; *Hanford v. Obright*, 49 Ills., 146; *Board of Education v. Greenbaum*, 39 Ills., 610; *Miner v. Phillips*, 42 Ills., 123; *Winslow v. Newlan*, 45 Ills., 145; *Toledo, P. & W. R. R. Co. v. Parker*, 49 Ills., 385; *Caswell v. Cooper*, 18 Ills., 532.

⁹ *Brush v. Seguin*, 24 Ills., 254.

¹⁰ *Metcalf v. Edmeston*, 25 Ills., 392; *Booth v. Town of Carthage*, 57 Ills., 102.

§ 937. **Evidence—Time—Place.**—It is not necessary to prove time as alleged unless it enters into the essence or description of the offense.¹ Where a party charged with a criminal offense is convicted, and on error the record, purporting to contain all the evidence, fails to show that the offense was committed in the county as charged in the indictment, the judgment will be reversed and the cause remanded for another trial.² Therefore if the proof fails to show that the offense was committed within the county and within the jurisdiction of the court, the defendant should be acquitted.³ Usually it is not necessary to prove the town in which the offense was committed.⁴

§ 938. **Confessions.**—A free and voluntary confession made by a prisoner, without being influenced by any promise, threat or fear, is of the highest order of evidence,⁵ even though the person making the confession is an infant.⁶ Confessions may be received in evidence though induced by deception practiced on the prisoner or by false representations made to him for the purpose, if the inducement was not calculated to produce an untrue confession; as where a prisoner in jail asked the turnkey to put a letter in the postoffice for him, and on his promise to do it the prisoner handed him a letter addressed to his father, which the turnkey, instead of putting in the office, sent to the prosecutor and it was read on the trial.⁷ So where a witness offered to render such assistance

¹ *Koop v. People*, 47 Ills., 327.

² *Rice v. People*, 38 Ills., 435; *Jackson v. People*, 40 Ills., 405.

³ *Sattler v. People*, 59 Ills., 68, *ante* § 84.

⁴ *State v. Gibson*, 29 Iowa, 295.

⁵ *Miller v. People*, 39 Ills., 457; *Bergen v. People*, 17 Ills., 426; *State v. Jefferson*, 6 Ired., 305; *State v. Huntly*, 3 Ind., 418; *Campbell v. State*, 23 Ala., 44; *Com. v. Knapp*, 10 Pick., 477; *Morgan v. State*, 11 Ala., 289; *People v. Harriden*, 1 Park. Cr. R., 344; *Smith v. Com.*, 10 Grat., 734; *Cropper v. U. S.*, *Morris Iowa*, 259; *State v. Ostrander*, 18 Iowa, 454; *Stephen v. State*, 11 Ga., 226.

⁶ 1 Arch. C. P. & Pl., 407; *Rex v. Thornton*, Ry. & M., 27; *State v. Aaron*, 1 South, 231; *Studstill v. State*, 7 Ga., 2.

⁷ 1 Greenl. Ev., § 229; *Rex v. Derring*, 2 Car. & P., 418; *Gates v. People*, 14 Ills., 437.

to a prisoner charged with murder as he might desire, and the prisoner requested him to tell his brother to write that letter, and that he, the witness, would then place the letter in the postoffice at a particular place, and the witness carried the message, obtained the letter, and instead of placing it in the office, delivered it to the prosecutor, and it was read in evidence on the trial, it was held that the letter was properly received in evidence, and the fact that the prisoner was deceived by the witness did not render the evidence inadmissible.¹ Proof of a confession is admissible even though it was obtained by a threat to sue for the property stolen.² The confessions of a party accused of crime, not made in open court or on examination before a magistrate, but to an individual, uncorroborated by circumstances inspiring belief in their truth, arising out of the conduct of the accused or otherwise, without proof independently of the confessions, that a crime has been committed, will not justify a conviction.³ It is no objection to a confession as such that it was made when the party was under oath.⁴

§ 939. **Confessions, when Inadmissible.**—Confessions made by a prisoner under the influence of promises or threats, or induced by the appliances of hope or fear, are not regarded as voluntarily made and cannot be relied on as true, therefore they are inadmissible in evidence.⁵ But if facts are elicited

¹ *Gates v. People*, 14 Ills., 434.

² *Cropper v. U. S.*, *Morris Iowa*, 259.

³ *Bergen v. People*, 17 Ills., 426; *State v. Guild*, 5 Halst., 163, 185; *State v. Long*, 1 Haywood, 455; *People v. Hennessy*, 15 Wen., 147; *People v. Badgley*, 16 Wen., 53; *State v. Fields*, Peck. R., 140; *State v. Gardiner*, Wright, 392; *State v. Turner*, 19 Iowa, 144; *State v. Wilson*, 8 Iowa, 408; *Keithler v. State*, 10 Sm. & M., 229; *Stringfellow v. State*, 26 Missis., 157; *People v. Ruloff*, 3 Park. Cr. R., 401; *contra*, *State v. Gowan*, 7 Ired., 239; *People v. Hope*, 1 City H. Rec., 150; *State v. Guild*, 5 Halst., 165.

⁴ *State v. Broughton*, 7 Ired., 96; *State v. Vaigneur*, 5 Rich., 391; *People v. Hendrickson*, 1 Park. Cr. R., 406; *Seld.*, 13; *Rex v. Haworth*, 4 Car. & P., 254.

⁵ 1 Arch. C. P. & Pl., 413; *Gates v. People*, 14 Ills., 437; *Miller v. People*, 39 Ills., 457; *Austine v. People*, 51 Ills., 236; *State v. Aaron*, 1 South, 239; *State v. Harman*, 3 Harring., 567; *State v. Bostwick*, 4 Harring., 563; *State v. Grant*, 22 Me., 171; *Com. v. Chabbock*, 1 Mass., 144; *State v. Phelps*, 11 Vt., 116; *Bryant v. State*, 9 Humph., 635; *Spears v. Ohio*, Ohio N. S. 583; *State*

by such confessions they may be given in evidence; as where stolen goods are found in the place indicated by the prisoner.¹ Where one was taken from his home about midnight by a body of men armed and disguised, and hung on a tree in a neighboring wood, and being taken down almost senseless, made a confession, implicating himself and others in a robbery, it was held to be error to allow it to go to the jury on the trial of an indictment for the offense against those thereby implicated.²

§ 940. *Admissions.*—The declarations of a third person made in the presence of the defendant and assented to by him are admissible in evidence against him and stand on an equal footing with admissions by himself.³ Where a man at full liberty to speak, and not in the course of a judicial proceeding, is charged with a crime and remains silent—that is, makes no denial of the accusation by word or gesture—his silence is a circumstance which may be left to a jury.⁴ But it is a question for the jury whether the defendant's apparent assent in such case arose from inattention or ignorance.⁵ An unanswered letter found in the pocket of the prisoner at the time of his arrest is not of itself evidence of the contents, and it cannot be read in evidence against him on the trial.⁶ The admissions of the alleged owner of stolen property as to the title of the property are not admissible except for the purpose of impeaching him.⁷

v. Ostrander, 18 Iowa, 454; *State v. York*, 37 N. H., 179; *State v. Long*, 1 Hayw., 455; *State v. Jenkins*, 2 Tyler, 379; *Smith v. Com.*, 10 Grat., 734; *Deathridge v. State*, Sneed Tenn., 75; *Com. v. Knapp*, 9 Pick., 496; *Hector v. State*, 2 Mo., 135.

¹ *Gates v. People*, 14 Ills., 437.

² *Miller v. People*, 39 Ills., 458.

³ *Com. v. Call*, 21 Pick., 515; *Rex v. Smyth*, 5 Car. & P., 332.

⁴ *State v. Swink*, 2 De. & Bat., 9; *State v. Stone*, Rice R., 187; *State v. Pratt*, 20 Iowa, 267; *Dornelly v. State*, 2 Dutch. N. J., 463; *Com. v. Kenney*, 12 Met., 233; *Hagenbaugh v. Crabtree*, 33 Ills., 225.

⁵ *State v. Perkins*, 3 Hawks, 377; *State v. Welsh*, 7 Port., 463; *Berry v. State*, 10 Ga., 511; *Jewett v. Banning*, 23 Barb., 13.

⁶ *People v. Green*, 1 Park. Cr. R., 11.

⁷ *State v. Delong*, 12 Iowa, 454.

§ 941. *As to the Whole of the Confession, etc.* — When a part of a confession or admission has been put in evidence, the prisoner may insist upon the whole being stated, for the part omitted may qualify or control the meaning of the part stated.¹ But while the whole confession must be considered together, yet the jury may believe one part and disregard the other.²

§ 942. *Effect to be Given to Admissions.* — In some cases admissions are very weak evidence, but under other circumstances, as when the party making them has full knowledge of the facts, and all the proof shows that no mistake could have been made in stating the language used in making the admissions, they are the strongest kind of evidence.³ The jury must determine from the probability or improbability of their being fabricated or of the witnesses by whom the admissions are proved being mistaken as to the exact language used in making the admissions and all of the facts and circumstances of the case, what weight shall be given them.⁴ The admissions are not conclusive upon the party making them, for the jury must not only be satisfied that the admissions were made, but also that they are true, before being governed by them.⁵

§ 943. *Acts and Declarations of Persons Jointly Guilty.* — In cases of crimes committed by several persons, when once the joint design, combination or purpose to commit the offense is

¹ 1 Arch. C. P. & Pl., 411; *Respublica v. McCarty*, 2 Dall., 86; *People v. Johnson*, 2 Wheeler C. C., 377; *State v. Elliott*, 15 Iowa, 72; *Aulger v. Smith*, 34 Ills., 534.

² *Com. v. Brain*, 9 Leigh, 633; *Green v. State*, 13 Mo., 382; *Bower v. State*, 5 Mo., 364; *Rex v. Clewes*, 4 Car. & P., 221; *Rex v. Steptoe*, 4 Car. & P., 397; *Rex v. Jones*, 2 Car. & P., 629; *Rex v. Higgins*, 3 Car. & P., 603.

³ *Yoe v. People*, 49 Ills., 411.

⁴ *Harding v. Clark*, 15 Ills., 30; *Ingalls v. Bulkley*, 15 Ills., 224; *Blatner v. Weis*, 19 Ills., 246; *Henkle v. Smith*, 21 Ills., 238; *Robbins v. Butler*, 24 Ills., 387; *Frizell v. Cole*, 29 Ills., 465; *Ayers v. Metcalf*, 39 Ills., 307; *O'Reiley v. Fitzgerald*, 40 Ills., 310; *Yundt v. Hartrunft*, 41 Ills., 9; *Diversy v. Kellog*, 44 Ills., 114.

⁵ *Ray v. Bell*, 24 Ills., 444; *Young v. Foute*, 43 Ills., 33; *Yoe v. People*, 49 Ills., 410.

established, the acts and declarations of each in the prosecution of the enterprise are considered the acts of all, though some are not present, and if a part of the transaction are evidence against all.¹ But the confessions, admissions or declarations made after the offense was committed, at another time, if not a part of the *res gestæ* are only evidence against the party making them.²

§ 944. **Accomplice — Definition of — Conviction on the Testimony of.** — An accomplice is one who is in some way concerned in the commission of a crime, though not as a principal, and this includes all persons who have been concerned in its commission, whether they are considered in strict legal propriety as principals in the first or second degree, or merely as accessories before or after the fact.³ A legal conviction may be had upon the uncorroborated testimony of an accomplice.⁴ The wife of an accomplice is a competent witness.⁵

¹ U. S. *v.* Harman, 1 Bald., 292; *Martin v. Com.*, 11 Leigh, 745; U. S. *v.* Goodwin, 12 Wheat., 469; *State v. Soper*, 13 Me., 293; *Com. v. Eberle*, 3 Serg. & R., 9; *Johnson v. State*, 29 Ala., 62; *Malone v. State*, 8 Ga., 408; *Com. v. Crowinshield*, 10 Pick., 497; *Brennan v. People*, 15 Ills., 511; *Gardiner v. People*, 3 Scam., 90; *Kennedy v. People*, 40 Ills., 488; *Bell v. Mallory*, 61 Ills., 167.

² *Patton v. State*, 6 Ohio N. S., 467; *Hunter v. Com.*, 7 Grat., 641; *Rex v. Turner*, 1 Moody, 347; *Rex v. Appleby*, 3 Stark., 33; *Frost v. Com.*, 9 Monr., 362; *Com. v. Briggs*, 5 Pick., 429; *Lawson v. State*, 20 Ala., 66; *Com. v. Ingraham*, 7 Gray Mass., 46; U. S. *v.* White, 5 Cranch. C. C., 38; *Morrison v. State*, 5 Ohio, 439; *Kirby v. State*, 7 Yerg., 259; but see *State v. Knight*, 19 Iowa, 94.

³ 4 Black. Com., 331; 1 Phil. Ev., 28; *Cross v. People*, 47 Ills., 158; see *Com. v. Boynton*, 116 Mass., 343.

⁴ 1 Bish. Cr. P., § 1081; *Gray v. People*, 26 Ills., 344; *Cross v. People*, 47 Ills., 160; *Com. v. Bosworth*, 22 Pick., 397; *Com. v. Savory*, 10 Cush., 535; *People v. Loham*, 2 Barb., 216; *People v. Costello*, 1 Denio, 83; *Rex v. Jones*, 2 Campb., 132; *Rex v. Atwood*, 2 Leach, 521; *Rex v. Hastings*, 7 Car. & P., 152; *Coats v. People*, 4 Park. Cr. R., 662; *People v. Dyle*, 21 N. Y., 578; *Dunn v. People*, 29 N. Y., 523; *contra*, *State v. Howard*, 32 Vt., 380; *State v. Thornton*, 25 Iowa, 79; *State v. Hull*, 26 Iowa, 292; *State v. Clemens*, 38 Iowa, 257; *Detective v. State*, 36 Iowa, 343; *People v. Whipple*, 9 Cowen, 707; *Ray v. State*, Greene Iowa, 316; *Johnson v. State*, 4 Greene Iowa, 65; *State v. Pepper*, 11 Iowa, 347; *State v. Schlagel*, 19 Iowa, 169; *State v. Moran*, 34 Iowa, 453.

⁵ *State v. Moore*, 25 Iowa, 138; *Haskins v. People*, 16 N. Y., 344.

§ 945. **Interpreter.** — Where the jury is to be informed by the aid of an interpreter, the court may require the primary meaning of the words used in connection with any significant word to be given; so that the jury, in case of disagreement as to its proper signification may determine the meaning of the party using the word intended thereby.¹

5. CLOSING ARGUMENTS.

§ 946. **Summing up.** — After the evidence has been closed on both sides, the party or the counsel for the party holding the affirmative of the issue first addresses the jury;² he is then followed by both counsel for the other side, if there is more than one counsel on that side, and then the case is closed by the party holding the affirmative or his counsel. Where, in a prosecution for murder, the defense does not controvert the killing, but denies the necessary malicious intent on the ground of insanity of the defendant, the burden of proof to establish such intent being upon the people, the defendant is not entitled to the opening and closing of the argument.³ So in a case of murder the burden of proof is on the people to show the want of a sufficient provocation, the absence of self-defense, etc.⁴

§ 947. **Improper Conduct of the State's Attorney in Addressing the Jury — Medical Books — Testimony in Another Case.** — Where the state's attorney in his address to the jury reads from medical books not in evidence, or reads the testimony of a professor of chemistry given in another case, in another state and reported in the criminal reports, or makes a statement that he has a witness by whom he could have proved a certain declaration made by the prisoner stating it, but that he was

¹ *Schnier v. People*, 23 Ills., 17.

² *Harvey v. Ellithorpe*, 26 Ills., 418.

³ *State v. Felter*, 32 Iowa, 50; *Loefrier v. State*, 10 Ohio S., 598; see *Hopps v. People*, 31 Ills., 385; *Chase v. People*, 40 Ills., 358; *People v. McCann*, 16 N. Y., 58, 3 Park. Cr. R., 272; *Polk v. State*, 19 Ind., 170; *Stevens v. State*, 9 Law Reg. N. S., 530; *People v. Garbutt*, 17 Mich., 9.

⁴ *State v. Morphy*, 33 Ills., 270; *State v. Porter*, 34 Iowa, 140.

sick, such declaration being a serious admission against him, or asserts his own belief in the guilt of the accused, or states facts bearing upon the question of the prisoner's guilt, against objection, in case the prisoner is convicted a new trial should be granted for such improper conduct of the attorney,¹ unless the court directs the jury to disregard the evidence and statements of the attorney so introduced into the case.²

6. INSTRUCTIONS.

§ 948. **Instructions to be Few and Brief — Right to Limit.** — Instructions should be few, and those as plain and simple as language can make them.³ They should be concise and briefly present the point of law on which the party relies.⁴ The right of a party to ask instructions must have some limit, and the Supreme Court will not sanction the abuse of it.⁵ When a legal principle has once been announced in an instruction there is no necessity for its repetition, and it is not error to refuse to give it in a second instruction.⁶

§ 949. **Instruction, when to be Given.**—The court is bound, when requested, to instruct the jury as to the law on any material point in the case⁷ on which there is any proof, although there is no direct proof upon the point.⁸ If, however, no evidence was given upon a point, the judge is not under obligation to charge the jury in respect to it, though requested.⁹ While it may be the duty of the court to instruct the jury as to the law relating to the facts proved, his omission

¹ *Yoe v. People*, 39 Ills., 410.

² *Id.*, *Kennedy v. People*, 40 Ills., 489.

³ *Springdale Cemetery Association v. Smith*, 24 Ills., 480.

⁴ *Merritt v. Merritt*, 20 Ills., 65.

⁵ *Fisher v. Stevens*, 16 Ills., 397.

⁶ *Bland v. People*, 3 Scam., 364; *Murphy v. People*, 37 Ills., 447; *Kennedy v. People*, 40 Ills., 488; *State v. Schlagel*, 19 Iowa, 169; *State v. Knight*, 43 Me., 11; *State v. Bunker*, 14 Lou. An., 461; *Hatcher v. State*, 18 Ga., 460; *People v. Raimrez*, 13 Cal., 172; *Scott v. Wirshing*, 64 Ills., 603.

⁷ *Jared v. Goodlittle*, 1 Blackf., 29; *Lewis v. State*, 4 Ohio, 397.

⁸ *Wooters v. King*, 54 Ills., 343.

⁹ *McCoy v. State*, 15 Ga., 205; *Drake v. Curtis*, 1 Cush., 395.

to give an instruction as to any point in the case will not be error unless he was requested so to do before the jury retired to consider of their verdict.¹ And the circuit courts have power by reasonable and proper rules to prescribe within what time during the progress of a trial instructions must be presented.²

§ 950. *Instructions to be in Writing.*—The statute requires the instructions to be wholly in writing.³ Each party asking instructions should reduce them to writing and see that they are proper in themselves and submit them to the court.⁴ If they are correct the court should give them as asked,⁵ if not correct the court may either refuse to give them⁶ or change them so as to make them correct and then give them to the jury,⁷ but the judge has no authority to affect or change the law as stated in written instructions by any expressions not in writing.⁸ The statute does not inhibit the court from giving such instructions as to the law of the case as he thinks proper and conducive to justice, without being asked, provided they are given in writing.⁹

¹ *State v. Catlin*, 3 Vt., 520; *Aslop v. Swathel*, 7 Conn., 500; *State v. Hascall*, 6 N. H., 352; *State v. Smelser*, 12 Lou. An., 386; *State v. O'Neil*, 7 Ired., 251; *Dave v. State*, 22 Ala., 23; *Burns v. Com.*, 3 Met. Ky., 13; *contra*, *Owen v. Owen*, 22 Iowa, 270; *State v. Collins*, 20 Iowa, 85; *Muldown v. I. C. R. R. Co.*, 32 Iowa, 176; *State v. Brainard*, 25 Ills., 572; *State v. O'Hagan*, 3 Iowa, 504.

² *Prindiville v. People*, 42 Ills., 217.

³ *Bloomer v. Sherill*, 11 Ills., 483; *Ray v. Wooters*, 19 Ills., 82.

⁴ *Denman v. Bloomer*, 11 Ills., 177.

⁵ *State v. Wilson*, 2 Scam., 225; *Hays v. Borders*, 1 Gilm., 46; *G. & C. U. R. R. Co. v. Jacobs*, 20 Ills., 478; *Davis v. State*, 10 Ga., 101; *Cotton v. State*, 31 Missis., 504; *Stanton v. State*, 13 Ark., 317.

⁶ *Morgan v. Peet*, 32 Ills., 281; *Baxter v. People*, 3 Gilm., 368; *Stanton v. State*, 13 Ark., 317; *Swallow v. State*, 22 Ala., 20; *Atkinson v. Snow*, 30 Me., 364.

⁷ *State v. Wilson*, 2 Scam., 225; *Hays v. Borders*, 1 Gilm., 46; *Mark v. State*, 36 Missis., 77; *Keithler v. State*, 10 Sm. & M., 192; *State v. Wilson*, 8 Iowa, 407; *Morgan v. Peet*, 32 Ills., 281; *Shultz v. State*, 13 Texas, 401; *Campbell v. Day*, 16 Vt., 558; *Long v. State*, 12 Ga., 293; *Lambeth v. State*, 23 Missis., 322; *Boles v. State*, 9 Sm. & M., 284.

⁸ *Ray v. Wooters*, 19 Ills., 82.

⁹ *Brown v. People*, 4 Gilm., 439; *Green v. Lewis*, 13 Ills., 642; *G. & C. U. R. R. Co. v. Jacobs*, 20 Ills., 478; *Stumps v. Kelley*, 22 Ills., 140.

§ 951. **Oral Remarks of the Judge.**—A judge may properly correct counsel when they mistake the evidence or assume as facts what is not proved,¹ or he may confine counsel in their argument to the jury to such points of law as he may suppose control the case² without doing it in writing. Where the judge remarked in answer to a motion of counsel to exclude certain testimony of the opposite party, that he thought that the fact to which that testimony related had been proven, it was held not to be objectionable.³ But the judge has no right during the progress of the trial orally to express an opinion as to the facts or law of the case calculated to mislead the jury or prejudice the party,⁴ and if it appears from the bill of exceptions that he has done so the judgment will be reversed.⁵ Where a jury who were trying a party on the charge of murder were about to retire to consider of their verdict, it being in the night time, the judge remarked to them orally, "It is now about nine o'clock and the court will continue in session a half an hour, to see if there should be any possibility of agreement. If there should be no possibility of agreement the court will adjourn until morning," it was held that these remarks could not have injuriously hastened the action of the jury, as they did not in fact agree until some hours afterwards.⁶ Where the court in the hearing of the jury stated that "whatever Mrs. M. may have said to B. and V. that night or to J. in the morning after, as to its being J.'s hired man that assaulted her, and that it was a thickset, dark-complexioned man with a white hat on, amounted to nothing, when the proof shows that as soon as she saw him she said he was not the man," it was held to be assuming the province of the jury, and error.⁷

¹ *Bill v. People*, 14 Ills., 432.

² *O'Hara v. King*, 52 Ills., 304.

³ *Deshler v. Beers*, 32 Ills., 368.

⁴ *Bill v. People*, 14 Ills., 432; *Deshler v. Beers*, 32 Ills., 368; *Winslow v. Newland*, 45 Ills., 151.

⁵ *O'Hara v. King*, 52 Ills., 304; *Fisher v. People*, 23 Ills., 295.

⁶ *McIntyre v. People*, 38 Ills., 514.

⁷ *Kennedy v. People*, 44 Ills., 283.

§ 952. **Requisites of an Instruction.** — The court should refuse to give an instruction when there is no evidence on which to base it;¹ or if it assumes the existence of a fact which the evidence does not show to exist;² or if it contains only an abstract legal proposition,³ even if correctly stated,⁴ though the judgment will not be reversed for giving such an instruction;⁵ or if drawn at great length and has an argument injected into it;⁶ or if the instruction is designed to bring infamy on a party and is not authorized by the evidence;⁷ or if it requires the jury to find and determine a legal proposition;⁸ or if it is irrelevant to the issue;⁹ or is fully embraced in another al-

¹ *State v. Robinson*, 39 Me., 150; *Jones v. State*, 13 Texas, 168; *Daniels v. State*, 24 Texas, 389; *Paulin v. Howser*, 63 Ills., 312; *Van Horn v. Burroughs*, 62 Ills., 388; *Humphries v. Collier*, 1 Scam., 47; *State v. Arthur*, 23 Iowa, 430; *Means v. Lawrence*, 61 Ills., 139; *Mitchell v. Town of Fon du Lac*, 61 Ills., 174; *New Engl. F. & M. Ins. Co. v. Wetmore*, 32 Ills., 221; *Lawrence v. Jarvis*, 32 Ills., 305; *Tyler v. Western Union Telegraph Co.*, 60 Ills., 421; *Hessing v. McCloskey*, 37 Ills., 341; *Mason v. Jones*, 36 Ills., 212; *C. B. & Q. R. R. Co. v. Gregory*, 58 Ills., 274; *Chicago & Gr. East. R. R. Co. v. Fox*, 41 Ills., 106; *Leake v. Brown*, 43 Ills., 373; *Nichols v. Mercer*, 44 Ills., 250; *Prescott v. Maxwell*, 48 Ills., 32; *Sprague v. Hazenwinkle*, 53 Ills., 419; *McCoy v. State*, 15 Ga., 205; *Drake v. Curtis*, 1 Cush., 395; *Hamilton v. Singer M. Co.*, 54 Ills., 370; *Oxley v. Stover*, 54 Ills., 159; *G. C. U. R. R. Co. v. Jacobs*, 20 Ills., 478; *County Court v. Buck*, 27 Ills., 440; *State v. Cain*, 2 Jones N. C., 201; *Brown v. State*, 28 Ga., 199.

² *Wilcox v. Kenzie*, 3 Scam., 218; *Hopkinson v. People*, 18 Ills., 264; *Adams v. Smith*, 55 Ills., 418; *Dart v. Horn*, 20 Ills., 212; *Duffield v. Delancey*, 36 Ills., 258; *Durham v. Goodwin*, 54 Ills., 469; *Pate v. People*, 3 Gilm., 644; *People v. Cunningham*, 1 Denio, 524; *Lewis v. State*, 4 Ohio, 389.

³ *Etting v. U. S. Bank*, 11 Wheat., 59; *Buster v. State*, 26 Ala., 107; *State v. Hall*, 39 Me., 107; *State v. Houser*, 28 Mo., 233; *Browning v. State*, 30 Missis., 656; *Long v. State*, 12 Ga., 293; *Riley v. Dickens*, 19 Ills., 29; *C. B. & Q. R. R. Co. v. George*, 19 Ills., 510.

⁴ *Hessing v. McCloskey*, 37 Ills., 341; *Dole v. Kennedy*, 38 Ills., 282; *American Ex. Co. v. Parsons*, 44 Ills., 312; *Ashlock v. Linder*, 50 Ills., 169.

⁵ *Corbin v. Shearer*, 3 Gilm., 482; *Pate v. People*, 3 Gilm., 644; *Means v. Lawrence*, 61 Ills., 139.

⁶ *Merritt v. Merritt*, 20 Ills., 65; *Roe v. Taylor*, 45 Ills., 485; *Chapman v. Cawrey*, 50 Ills., 512.

⁷ *Pfund v. Zimmerman*, 29 Ills., 269.

⁸ *Mitchell v. Town of Fon du Lac*, 61 Ills., 174.

⁹ *Wallace v. Wren*, 32 Ills., 146; *Stout v. McAdams*, 2 Scam., 67; *Rice v. People*, 38 Ills., 435; *Murphy v. People*, 37 Ills., 447.

ready given;¹ if it has a tendency to mislead the jury in reference to the rights of the immediate parties to the suit, though it may be abstractly correct in view of the rights of certain persons;² or if not framed with reference to the circumstances of the case on trial, and is expressed in abstract and general terms, when such terms may mislead instead of enlightening the jury,³ or if it is framed by selecting one or several isolated facts in the evidence, and calling the special attention of the jury to its or their consideration, though as a general rule the court will not reverse the judgment for the reason that such an instruction was given;⁴ or if it is so obscure and confused that it is calculated to mislead the jury;⁵ or if it assumes to decide a question of fact where the evidence is conflicting or tends to prove the issue instead of leaving it to the jury;⁶ or if it is argumentative and only pre-

¹ *May v. Tallman*, 20 Ills., 443; *Roth v. Smith*, 54 Ills., 431; *Hessing v. McCloskey*, 37 Ills., 341; *C. & A. R. R. v. Utley*, 38 Ills., 410; *Bland v. People*, 3 Scam., 364; *C. R. & P. R. R. Co. v. Reidy*, 66 Ills., 44; *McCartney v. McMullen*, 44 Ills., 237; *Mason v. Jones*, 36 Ills., 212; *Cass v. Campbell*, 63 Ills., 259; *Bourne v. Stout*, 62 Ills., 262; *Bowen v. Schuler*, 41 Ills., 192; *Hatty v. Markel*, 44 Ills., 225; *C. & A. R. R. Co. v. Murray*, 62 Ills., 326; *Bowen v. Rutherford*, 60 Ills., 41; *Underwood v. White*, 45 Ills., 437; *Emery v. Hoty*, 46 Ills., 258; *Sangamon Ins. Co. v. McKeen*, 60 Ills., 167; *City of Chicago v. Smith*, 48 Ills., 107; *Weyhrich v. Foster*, 48 Ills., 115; *Murphy v. People*, 37 Ills., 447; *Kennedy v. People*, 40 Ills., 488.

² *Webber v. Brown*, 38 Ills., 87; *Reeder, Purdy*, 41 Ills., 280; *Trustees v. McCormick*, 41 Ills., 323; *Nichols v. Mercer*, 44 Ills., 250; *Ten Eyck v. Harris*, 47 Ills., 268.

³ *C. & A. R. R. Co. v. Utley*, 38 Ills., 410; *Ills. C. R. R. Co. v. McClelland*, 42 Ills., 355; *Hite v. Branford*, 45 Ills., 9; *Hassett v. Johnson*, 48 Ills., 68; *Baxter v. People*, 3 Gilm., 368.

⁴ *Grube v. Nichols*, 36 Ills., 92; *McCartney v. McMullen*, 38 Ills., 237; *Chittenden v. Evans*, 41 Ills., 251; *State v. Canahan*, 17 Iowa, 256.

⁵ *Baxter v. People*, 3 Gilm., 368; *Haskin v. Haskin*, 41 Ills., 197; *Roth v. Smith*, 54 Ills., 421; *State v. Bunker*, 14 Lou. An., 461; *Priesker v. People*, 47 Ills., 388.

⁶ *Frasure v. Zimmerly*, 25 Ills., 202; *Gehr v. Hagerman*, 26 Ills., 438; *Myer v. Walker*, 31 Ills., 354; *Collins v. Waters*, 51 Ills., 78; *Owens v. Derby*, 2 Scam., 26; *Davis v. Hoxie*, 1 Scam., 406; *Blake v. Dow*, 18 Ills., 261; *Stumps v. Kelley*, 22 Ills., 140; *Orne v. Cook*, 37 Ills., 186; *McDeed v. McDeed*, 67 Ills., 546; *Eams v. Blackhart*, 12 Ills., 195; *Sherman v. Dutch*, 16 Ills., 283; *Andrews v. People*, 60 Ills., 354; *Wall v. Goodenough*, 60 Ills., 415; *Wine v.*

sents a partial view of the case;¹ or if it assumes that a verdict will be rendered in favor of any particular party;² or if it directs the jury as to the weight of evidence;³ or if it assumes the guilt or innocence of the accused;⁴ or if it assumes that an intent may be conclusively presumed from the existence of another fact to be felonious, and at the same time that the intent may be shown to be innocent;⁵ or if it assumes that a material fact in the the case is true;⁶ or if it takes from the consideration of the jury evidence which tends to establish a material fact in issue.⁷ Instructions should be so given as not to leave the jury to conjecture about the truth, but so as to direct their minds to the facts as proved.⁸

§ 953. **Instructions to be Given Hypothetically—Omission, how Obviated.**—Instructions should be given hypothetically and be so drawn as to state the law upon a supposed state of facts to be found by the jury, and not assume the facts as proved.⁹ But when in giving instructions the existence of certain facts is assumed about which the parties are agreed neither party can afterwards make the assumption a ground of exception.¹⁰ An omission in an instruction to state that a

Hammond, 37 Ills., 99; *Duffield v. Delancey*, 36 Ills., 258; *Ayers v. Metcalf*, 39 Ills., 307; *Collins v. People*, 48 Ills., 145; *Yundt v. Hartrunft*, 41 Ills., 9; *Small v. Brainard*, 44 Ills., 355; *Peoria M. & F. Ins. Co. v. Anapow*, 45 Ills., 86; *Houston v. State*, 4 Greene Iowa, 437; *Com. v. Lawless*, 103 Mass., 425; *Hassett v. Johnson*, 48 Ills., 68; *Reno v. Wilson*, 49 Ills., 95.

¹ *Chittenden v. Evans*, 48 Ills., 52.

² *Hawk v. Ridgway*, 38 Ills., 473.

³ *Seaverns v. Tribby*, 48 Ills., 195; *McDeed v. McDeed*, 67 Ills., 546; *Andrews v. People*, 60 Ills., 354; *Eubanks v. People*, 41 Ills., 486; *G. W. R. R. Co. v. Hanks*, 25 Ills., 241; *Fritzell v. Cole*, 42 Ills., 362; *Rockwood v. Poundstone*, 38 Ills., 199; *Duffield v. Delancey*, 36 Ills., 258.

⁴ *Jupitz v. People*, 34 Ills., 516; *Conkright v. People*, 35 Ills., 204.

⁵ *Armstrong v. People*, 38 Ills., 513.

⁶ *Bond v. People*, 39 Ills., 26; *Dart v. Horn*, 20 Ills., 212; *M. S. & N. I. R. R. Co. v. Shelton*, 66 Ills., 425; *Duffield v. Delancey*, 36 Ills., 258; *State v. Jones*, 33 Iowa, 11; *Houston v. State*, 4 Greene Iowa, 437.

⁷ *Marcy v. Taylor*, 19 Ills., 634.

⁸ *Ewing v. Runkle*, 20 Ills., 448.

⁹ *Hopkinson v. People*, 18 Ills., 264; *Bond v. People*, 39 Ills., 26; *Sherman v. Dutch*, 16 Ills., 283; *State v. Thompson*, 19 Iowa, 304.

¹⁰ *Martin v. People*, 13 Ills., 341.

material fact must be proved is obviated when it appears from the evidence that such fact was actually clearly proved.¹

§ 954. **Instruction need not Embody all the Law Governing the Case.**—If it declares the law on the points presented it is sufficient.² It is not necessary that each instruction given to the jury should inform them that before they can convict, they must believe the accused to be guilty beyond a reasonable doubt.³

§ 955. **Inaccuracies in Instructions.**—Though an instruction is inaccurate, yet if it is manifest that the jury was not misled nor the opposite party injured thereby, the verdict will not be disturbed.⁴ A judgment will not be reversed because the words “from the evidence” after the word “believe” were left out of an instruction unless it appears that the jury were misled thereby.⁵ The use of the word “plaintiff” for “defendant” in an instruction and the omission of the word “if” in another place were held errors not calculated to mislead, and therefore immaterial.⁶

§ 956. **Naming a Witness in an Instruction** and directing the attention of the jury to his conduct while testifying is not objectionable.⁷

§ 957. **Instruction as to the Application of the Evidence.**—If evidence is admitted competent for one purpose which may have an improper effect, the party aggrieved should ask an instruction, explaining its legitimate effect; and then the views of the court, admitting the testimony, may be canvassed.⁸

§ 958. **Evidence, how Weighed.**—Jurors may be instructed to

¹ C. N. W. R. R. Co. v. Dement, 44 Ills., 74; T., P. & W. R. R. Co. v. Parker, 49 Ills., 385; Clark v. Boyle, 51 Ills., 104.

² Hessing v. McCloskey, 37 Ills., 341; Town of Vinegar Hill v. Busson, 42 Ills., 45.

³ Kennedy v. People, 44 Ills., 283.

⁴ Potter v. Potter, 41 Ills., 81; Jarrard v. Harper, 42 Ills., 457.

⁵ Holliday v. Burgess, 34 Ills., 193.

⁶ Nichols v. Mercer, 44 Ills., 250.

⁷ Ammerman v. Teeter, 49 Ills., 400.

⁸ Prior v. White, 12 Ills., 261

weigh evidence by the light of their general knowledge and experience as applied to the events and transactions of life, but it is erroneous to instruct them to apply special knowledge or circumstances connected with the case in their possession in forming their verdict, unless the jurors shall have been sworn as witnesses.¹

§ 959. **It is not for the Court to Draw Inferences.**—It is not the province of the court to draw inferences from the evidence or to determine what it does or does not prove,² or to tell the jury what inferences they are to draw from the fact that a party is not sworn in the case.³ The judge has no right to express to the jury his own opinion in regard to the weight of the evidence.⁴

§ 960. **Absence of a Witness Creates no Presumption.**—Where a witness has been examined and leaves the court, so that he cannot again be found, as appears by a return to an attachment against him, it is not proper to instruct the the jury that it is probable that the witness avoids further examination thereby prejudicing his credibility.⁵

§ 961. **Instruction as in a Case of Nonsuit—Variance—Excluding**

¹ *Ottawa Gas Light and Coke Co. v. Graham*, 28 Ills., 73.

² *Eams v. Blackhart*, 12 Ills., 195; *Sherman v. Dutch*, 16 Ills., 283; *Wall v. Goodenough*, 16 Ills., 415; *Van Horn v. Burroughs*, 62 Ills., 388; *Stobie v. Dills*, 62 Ills., 433; *Town of Rutland v. Town of Dayton*, 60 Ills., 59; *Graff v. Simmons*, 58 Ills., 440; *Wood v. Mains*, 1 Greene Iowa, 275; *Fredrick v. Gaston*, 1 Greene Iowa, 401; *Ashlock v. Linder*, 50 Ills., 169; *Com. v. Lawless*, 103 Mass., 425; *McDeed v. McDeed*, 67 Ills., 546.

³ *Ashlock v. Linder*, 50 Ills., 169.

⁴ *Bill v. People*, 14 Ills., 432; *Fisher v. People*, 23 Ills., 283; *Houston v. State*, 4 Greene Iowa, 437; *Berry v. State*, 10 Ga., 511; *McGuffie v. State*, 17 Ga., 497; *Burtles v. State*, 4 Md., 273; *Jim v. State*, 4 Humph., 289; *Woodin v. People*, 1 Park. Cr. R., 464; *Noland v. State*, 19 Ohio, 131; *Atkins v. State*, 16 Ark., 568; *Rutherford v. Com.* 2 Met. Ky., 387; *Newcomb v. State*, 37 Missis., 383; *Andrews v. People*, 60 Ills., 354; *contra*, *Com. v. Child*, 10 Pick., 252; *People v. Rathbun*, 21 Wen., 509; *Swift v. Stevens*, 8 Conn., 431; *People v. Genung*, 11 Wen., 18; *U. S. v. Fourteen Packages*, Gilpin, 235; *People v. Quin*, 1 Park. Cr. R., 340; *Stephens v. People*, 4 Park. Cr. R., 396; *Gale v. Spooner*, 11 Vt., 152; *Stevens v. Talcott*, 11 Vt., 25; *Keaton v. State*, 7 Ga., 189.

⁵ *Coughlin v. People*, 18 Ills., 266.

Evidence.—In this state the court has no right to grant a non-suit,¹ but where a material fact, essential to the recovery, is omitted to be proved, or there is no evidence tending to prove it, the defendant may ask the court to instruct the jury that if such fact has not been proved, then they should find for the defendant.² When the evidence essentially varies from the pleadings and fails to sustain the issue, the court may and should when asked exclude it from the consideration of the jury.³ If the court takes a case from the consideration of the jury by excluding all of the evidence introduced, the judgment will not be reversed for that cause, where no injustice is done thereby.⁴

962. Sufficiency of Indictment—Sufficiency of Evidence—Crime or not—If what the indictment sets out does not constitute a crime;⁵ or if the evidence on giving it full credit does not show a crime or show the particular crime charged in the indictment;⁶ it is the duty of the court to instruct the jury to find for the defendant, and it is error to refuse such an instruction.⁷

§ 963. Further Instructions—Judge not to Communicate with the Jury except in Open Court.—A jury may be called into court for further instructions at their own request or by consent of parties or their counsel.⁸ If, however, in a criminal case instructions are given on the part of the people, the prisoner has also a right to have instructions given on his part.⁹ Jurors should not separately communicate to or with the court in writing or verbally in reference to any matter belonging to the case; but when communications are to be made they

¹ *Amos v. Sinnot*, 4 Scam., 440; *Rankin v. Curtenius*, 12 Ills., 334.

² *Teft v. Ashbaugh*, 13 Ills., 602; *House v. Wilder*, 47 Ills., 510; *Smith v. Gillett*, 50 Ills., 293.

³ *House v. Wilder*, 57 Ills., 510.

⁴ *Quinn v. I. C. R. R. Co.* 51 Ills., 495.

⁵ *People v. Cook*, 10 Mich., 164.

⁶ *Teft v. Ashbaugh*, 13 Ills., 602; *Com. v. Packard*, 5 Gray, 101; *Com. v. Merrill*, 14 Gray, 415, 418.

⁷ 1 Bish. Cr. P., § 977.

⁸ *Lee v. Quirk*, 20 Ills., 392.

⁹ *Fisher v. People*, 23 Ills., 283.

should be brought before the court in a body.¹ It is not proper for the judge before whom the cause is tried to visit the jury-room.²

§ 964. **Reasonable Doubt.**—The court usually concludes with an instruction, telling the jury that to convict the defendant they must be satisfied from the evidence of his guilt beyond a reasonable doubt.³ A reasonable doubt is one arising from a candid and impartial investigation of all the evidence, and such as in the graver transactions of life would cause a reasonable man to hesitate and pause.⁴ A merely chimerical or conjectural doubt will not justify an acquittal. When a jury can say after considering all of the evidence, that they have an abiding conviction of the truth of the charge, they are satisfied of the truth of the charge beyond a reasonable doubt.⁵ The rule in regard to a reasonable doubt applies to all offenses of every degree, whether greater or lesser,⁶ and it is the right of the accused under a well-founded doubt of his guilt to have a verdict of acquittal. The jury have no discretion about it.⁷

§ 965. **Forms of Instructions.**—A few forms of instructions which have been held to be correct in the cases in which they were given are inserted because they state the law correctly, and may be easily modified so as to make them applicable to other cases. It should, however, be remembered that instructions are never proper in any case unless they are applicable to and based upon the evidence given in the case.

¹ *Fisher v. People*, 23 Ills., 283; *Crabtree v. Hagenbough*, 23 Ills., 349.

² *Crabtree v. Hagenbough*, 23 Ills., 349; *Sergeant v. Roberts*, 1 Pick, 337.

³ 1 Arch. C. P. & Pl., 587; *Pate v. People*, 3 Gilm., 661; *Reins v. People*, 30 Ills., 227; *State v. Tweedy*, 5 Iowa, 433; *State v. Porter*, 34 Iowa, 131; *People v. Thayer*, 1 Park. Cr. R., 595; *Hiller v. State*, 4 Blackf., 552; *Com. v. Tuttle*, 12 Cush., 502.

⁴ *May v. People*, 60 Ills., 120; *Pate v. People*, 3 Gilm., 644; *State v. Sterling*, 34 Iowa, 443; *Reins v. People*, 30 Ills., 256; *State v. Nash*, 7 Iowa, 347; *State v. Ostrander*, 18 Iowa, 435; *Arnold v. State*, 23 Ind., 170, 34 Mo., 200.

⁵ *Miller v. People*, 39 Ills., 458; *State v. Bodekee*, 34 Iowa, 520.

⁶ *Wasden v. State*, 18 Ga., 264; *State v. King*, 20 Ark., 166; *Fuller v. State*, 18 Ohio S., 433; *Satterwhite v. State*, 28 Ala., 65.

⁷ *Reins v. People*, 30 Ills., 257.

INSTRUCTION AS TO JOINT CRIMINALITY.¹

While the law requires that to find the defendants guilty in this case the evidence should show that they were acting in concert, still it is not necessary that it should be positively proved that they actually met together and agreed to rob Randolph. Such concert may be proved from circumstances and if from all the evidence, the jury are satisfied that the defendants acted together, each aiding in his own, it would be sufficient.

INSTRUCTION AS TO AN ALIBI.¹

In this case, what in law is known as an alibi—that is, the defendants were at another place at the time of the commission of the robbery—is in part relied on by the defendants. To render the proof of an *alibi* satisfactory, the evidence must cover the whole time of the transaction in question, so as to render it impossible that the defendants could have committed the act.

FORM OF INSTRUCTION AS TO THE CREDIBILITY OF THE WITNESSES.²

In determining the guilt or innocence of the defendants the jury are to consider the entire evidence in the case, but they are at liberty to disregard the statements of such witnesses (if any there be) as have been successfully impeached either by direct contradiction or by proof of general bad character unless the statements of such witnesses have been corroborated by other evidence which has not been impeached.

FORM OF INSTRUCTIONS AS TO A REASONABLE DOUBT.³

In considering the case the jury are not to go beyond the evidence to hunt up doubts, nor must they entertain such doubts as are merely chimerical or conjectural. A doubt to justify an acquittal must be reasonable and it must arise from a candid and impartial investigation of all the evidence in the case, and unless it is such that, were the same kind of doubt interposed in the graver transactions of life, it would cause a reasonable and prudent man to hesitate and pause, it is insufficient to authorize a verdict of not guilty. If after considering all the evidence you can say you have an abiding conviction of the truth of the charge, you are satisfied beyond a reasonable doubt.

¹ Given for the people and held to be unobjectionable in *Miller v. People*, 39 Ills., 464.

² This instruction with the words, "It is not enough that it renders their guilt improbable merely" added at the end, was given in *Miller v. People*, 39 Ills., 464, but the court held that these words vitiated the whole instruction which would have been correct without them. *Id.*

³ Held to be unobjectionable in *Miller v. People*, 39 Ills., 463.

⁴ Given for the people and held sufficient in *Miller v. People*, 39 Ills., 463.

ANOTHER FORM OR QUALIFICATION OF AN INSTRUCTION.¹

That there should be more than a bare probability of the defendant's innocence; that they should have a reasonable doubt of his guilt, growing out of the unsatisfactory nature of the evidence; such a doubt as would induce a reasonable man to say, I am not satisfied that the defendant is guilty.

ANOTHER FORM USUALLY GIVEN FOR THE DEFENSE.²

If upon considering the whole of the evidence, the jury entertain a fair and reasonable doubt of the guilt of the prisoner, they should give the prisoner the benefit of that doubt and acquit him.

ANOTHER FORM EXPLAINING THE MEANING OF THE TERM REASONABLE DOUBT.³

A reasonable doubt exists when the evidence is not sufficient to satisfy the judgment of the truth of a proposition with such certainty that a prudent man would feel safe in acting upon it in his own important affairs.

ANOTHER FORM AS TO A REASONABLE DOUBT.⁴

That where there is a reasonable doubt of the defendant being proved to be guilty he is entitled to an acquittal.

FORM OF INSTRUCTION FOR THE DEFENDANT IN A CASE OF RAPE.⁵

If the jury believe from the evidence that the husband of the prosecutrix was, at the time the rape is alleged by her to have been committed, an able bodied man, and was at the said time within a few rods of the said place where the rape is alleged by her to have been committed; that he might easily have heard her had she made an outcry; that the prosecutrix made no outcry; that she and her husband remained for an hour or an hour and a half with the defendant, in a friendly manner, then these circumstances raise a strong presumption that no rape was committed.

FORM OF INSTRUCTIONS FOR THE PEOPLE IN A CASE OF MURDER.⁶

1. Murder is the unlawful killing of a human being in the peace of the people, with malice aforethought either express or implied by law.

¹ Given for the people and approved in *Pate v. People*, 3 Gilm., 661.

² Proper according to 1 Arch. C. P. & Pl., 587.

³ Approved in 1 Bish. C. P., §1052; *Arnold v. State*, 23 Ind., 170; *contra*, *State v. Dineen*, 10 Minn., 407; *State v. Oscar*, 7 Jones N. C., 305.

⁴ Approved in *Jane v. Com.*, 2 Met. Ky., 30, 33.

⁵ The judgement was reversed because not given in *Barney v. People*, 22 Ills., 160.

⁶ These instructions were held to be correct in the case of *Jackson v. People*, 18 Ills., 270.

2. Malice includes not only anger, hatred and revenge, but every other lawful and unjustifiable motive.

3. Malice is not confined to ill will toward an individual, but is intended to denote an action flowing from any wicked and corrupt motive—a thing done with a wicked mind, where the fact has been attended with such circumstances as evince plain indications of a heart regardless of social duty and fatally bent on mischief; hence malice is implied from any deliberate or cruel act against another, however sudden, which shows an abandoned and malignant heart.

4. If the jury shall find from the evidence that the killing of Roman Morris has been proved as charged, then any defense which the defendant may rely upon in justification or excuse of the act or to reduce the killing to the grade of manslaughter, it is incumbent on the defendant satisfactorily to establish such defense, unless the proof thereof arise out of the evidence produced against him.

5. If the killing of the person mentioned in the indictment be satisfactorily shown beyond all reasonable doubt to have been the act of the defendant, then the law pronounces it murder unless the defendant has shown or it appears by the evidence for the people that circumstances existed excusing or justifying the act or mitigating it so as to make it manslaughter.

6. If the jury believe from the evidence that the defendant killed Roman Morris, and, as charged, under circumstances showing no considerable provocation, but showing an abandoned and malignant heart on the part of the defendant, the law pronounces it murder.

7. If the killing is shown by the evidence to have been the act of the defendant as charged, and if the jury believe also that the defendant did not intend to kill, but only to disable the deceased, so that he might feloniously possess himself of money or property on the person of the deceased, it is murder.

8. The law presumes that a person intends all the natural probable and usual consequences of his acts; that when one person assails another violently with a dangerous weapon likely to kill, not in self defense and not in a sudden heat of passion caused by a provocation apparently sufficient to make the passion irresistible or involuntary, and the life of the party thus assailed is actually destroyed in consequence, then the legal and natural presumption is that death or great bodily harm was intended; in which case the law implies malice, and such killing would be murder.

9. It is the duty of the jury to treat and consider any confessions proven to have been made by the defendant precisely as any other testimony; and hence, if the jury believe the whole confession to be true, they will act upon the whole as truth. But the jury may believe that which charges the prisoner and reject that which is in his favor, if they see sufficient grounds in the evidence or any inherent improbability in the statement itself; the jury are at liberty to judge of it like other evidence, by all the circumstances of the case.

10. No provocation by words only, however opprobrious, will mitigate an intentional killing so as to reduce the killing to manslaughter.

11. And although the jury may believe, from the evidence, that the opprobrious epithets were used by the deceased to the defendant, yet if the jury further believe, from the evidence, that the defendant immediately revenged himself by the use of a dangerous and deadly weapon, in a manner likely to cause the death of Roman Morris, and did thereby cause his death as charged, then the defendant is guilty of murder, and the jury ought so to find.

12. A reasonable doubt requires, in law, that there should be more than a bare possibility of the defendant's innocence, but a reasonable doubt grows out of the unsatisfactory nature of evidence—such a doubt as would induce a reasonable man to say, "I am not satisfied that the defendant is guilty."

13. A reasonable doubt is not such a doubt as requires the ingenuity of a man's mind to invent, or an effort or search to find. It is not such as may be made to appear by imagining the possible existence of facts not proved. But a reasonable doubt is only such as arises upon consideration of all the facts which are actually in proof, and because of which the mind, acting reasonably, is still unsatisfied of the guilt of the party charged with the offense.

FORM OF INSTRUCTIONS IN A CASE OF MANSLAUGHTER FOR THE PEOPLE.¹

1. The court instructs the jury that manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible or involuntary, in the commission of an unlawful act, or a lawful act, without due caution or circumspection.

2. The court further instructs the jury that involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner.

3. The court further instructs the jury that, under the indictment in this case, which is for murder, the jury may and should find the defendant guilty of manslaughter, if they find from the evidence that he is guilty of manslaughter. And if they find him guilty of manslaughter they must fix in their verdict his punishment, which must be confinement in the state penitentiary for his natural life, or any number of years and not less than one year.

4. The court further instructs the jury (in the words of the statute) that "if a person kill another in self-defense, it must appear that the danger was so urgent and pressing that, in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary."

"A bare fear of any of these offenses to prevent which the homicide is

¹ Given and held to be proper in the case of *Greschia v. People*, 53 Ills., 296.

alleged to have been committed, shall not be sufficient to justify the killing. It must appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the party killing really acted under the influence of those fears, and not in a spirit of revenge."

5. The court instructs the jury that if they believe, from the evidence, beyond a reasonable doubt that the deceased, Lagarmarsen, and the defendant, Greschia, had a quarrel, with words, in or near the defendant's room, and on the stairs leading to said room; and that the deceased, after going a part way down stairs, turned about and went up the stairs, as if going to said room, to meet said defendant, with the purpose to further continue said quarrel, and that the deceased had no weapon or dangerous instrument; and that, when deceased got nearly to the door of the said room, or to it, the defendant willfully, intentionally and feloniously, struck the deceased several violent and severe blows on the head with the club, mentioned by the witnesses and shown in evidence; and that such club was a dangerous and deadly weapon, when it was not necessary, or apparently necessary, in order to prevent the deceased from entering said room and committing, or offering to commit, an assault upon said defendant, and when the defendant could have reasonably and safely avoided using such club in the manner aforesaid, then the jury should find the defendant guilty of manslaughter, if they believe, from the evidence, that the deceased died from the effects of such blows.

FORM OF INSTRUCTIONS FOR DEFENDANT.¹

1. If the jury believe, from the evidence, that the defendant inflicted the fatal blow upon the deceased in self-defense, while the deceased was manifestly intending and endeavoring, in a violent manner to enter the habitation of the defendant, for the purpose of assaulting or offering personal violence to the defendant, being therein, then the killing was justifiable, and the jury ought to acquit the defendant. (But the jury, in considering whether the killing was justifiable, on the ground that the killing was in self-defense, while the deceased was endeavoring, in a violent manner, to enter the prisoner's habitation, should consider the circumstances attending the killing, and the conduct of the parties at the time and immediately previous thereto, and the means used, and the degree of force used by the prisoner in making what is claimed to be this self-defense, as bearing upon the question, whether the blows given were actually given in self-defense, or whether they were given in carrying out an unlawful purpose. If the force used was unreasonable in amount and character, and such as a reasonable mind would have so considered under the circumstances, it is proper for the jury to consider that fact in determining whether the killing was in self-defense).

¹ These instructions were given for the defendant, that portion in brackets being modifications by the court of the instructions in the case of *Greschia v. People*, 53 Ills., 298.

2. If the jury believe, from the evidence, that just prior to his death, the deceased attempted, in a violent manner, to enter the dwelling of the defendant, for the purpose of assaulting or offering personal violence to the defendant, being in said dwelling, or any other person dwelling or being therein, and that the defendant, in (reasonably) resisting such attempt of the deceased, unintentionally and without malice killed the deceased, then the killing was justifiable or excusable, and the jury ought to acquit the defendant. (The jury in considering whether the killing was in defense of habitation, should consider the circumstances attending the killing, and the conduct of the parties at the time and immediately previous thereto, and the means and force used, as bearing upon the question of whether the killing was in defense of habitation.

INSTRUCTIONS IN A CASE OF MANSLAUGHTER¹ FOR THE PEOPLE.

1. If the jury believe, from the evidence, that the defendant did not renew the fight, but in good faith sought to decline any further struggle — yet if they further believe, from the evidence, that the defendant had no reason to believe that Kaine intended to take his life, or to inflict on him great bodily harm, or to have anything more than a fair fight, and that he struck the blow in revenge or in a reckless spirit, then the defendant is not entitled to claim exemption from punishment, on the ground that the killing was in self-defense. It must appear that the defendant not only really and in good faith endeavored to decline any further struggle, or to escape from his assailant before the blow was given, but it must also appear that the circumstances were sufficient to excite the fears of a reasonable person, and that the defendant really acted under the influence of those fears, and not in a spirit of revenge, to entitle the defendant to an acquittal on the ground of a justifiable homicide.

2. The jury, in determining whether the defendant actually feared the loss of life or great bodily harm to himself, or acted in a spirit of revenge, should take into their consideration the evidence, if any, tending to prove the knowledge and acquaintance of the defendant and deceased with each other, or of a previous difficulty between them, and whether or not the deceased had any weapon; also the manner in which the knife² was used by the defendant, if the jury believe, from the evidence, that a knife or some similar weapon was used.

3. If the jury find the defendant guilty in manner and form as charged in the indictment, then it is their duty to fix the term of his imprisonment in the penitentiary not less than one year, which may be extended to the natural life of the prisoner.³

¹ Given in *Reins v. People*, 30 Ills., 260.

² This instruction was held to be bad because there was no evidence in the case that the defendant had a knife. *Reins v. People*, 30 Ills., 274.

³ Given in *Reins v. People*, 30 Ills., 261; and approved substantially in *Mullen v. People*, 31 Ills., 444; R. S., 374, § 146.

4. If the jury believe, from the evidence, that the deceased, John Kaine, and the defendant, Michael Reins, had words and blows with and against each other shortly before the alleged killing, and that after having such words and blows they were separated, and that Kaine thereupon left the shanty of Foley; and if the jury further believe, from the evidence, that the defendant, after Kaine went out, followed him to the door with a view to renew the fight, and that Kaine thereupon turned back to attack and beat the defendant, and that defendant, while Kaine was entering the door, stabbed and killed him, then the defendant is guilty of manslaughter, and the jury should so find, unless the jury further believe, from the evidence, that the said stab was given by the defendant while actually fearing loss of life or great bodily harm to himself from the assault of Kaine, and not in a spirit of revenge. The bare fear of injury to the body is not a sufficient justification in any case for killing. The threatened danger to the person must be so great as to create a reasonable belief in the mind of the person assaulted of imminent peril to life or to his receiving great bodily harm.¹

INSTRUCTIONS FOR THE DEFENDANT.

1. If the jury believe, from the evidence, that the defendant, Reins, in defense of himself, inflicted upon the deceased the wounds or stabs which caused his death, while the deceased was manifestly intending and endeavoring in a violent manner to enter the habitation of the witness, Mrs. Foley, for the purpose of assaulting or offering personal violence to the defendant Reins, being therein, the killing was justifiable, and the jury must acquit the defendant.²

2. If the jury believe, from the evidence, that the defendant inflicted the wounds upon the deceased, which caused his death, and that he inflicted said wounds in self-defense, believing that his life was in danger, or that he was in danger of receiving great bodily harm from the deceased, and that such danger was so urgent and pressing, that to save his own life, or to prevent such harm, it was absolutely necessary for him to inflict the said wounds, and that the circumstances were sufficient to excite the fears of a reasonable person, they must acquit the defendant, unless³ they also find that the defendant sought to renew the fight, and did not really and in good faith endeavor to decline any further struggle before the mortal blow was given.

¹ In the original instruction in the place of the words "to his receiving great bodily harm," the words "the most serious bodily harm," were used, and for this reason the instruction was held to be erroneous. *Reins v. People*, 30 Ills., 275.

² This instruction was approved by the court. *Reins v. People*, 30 Ills., 275.

³ All after and including the word "unless" was added by the circuit judge and the modification was approved by the court. *Reins v. People*, 30 Ills., 275.

3. If the jury believe, from the evidence, that the deceased first assaulted the defendant, without any reasonable or justifiable cause, and that at the door of Mrs. Foley's shanty, the defendant tried and endeavored in good faith to escape from the deceased, and prevent his entry therein, and did not seek to renew the fight, and that defendant was in fear of his life or great bodily harm from the deceased, and that from all the surrounding circumstances he had reasonable grounds for such fears, they shall acquit the defendant.¹

4. If the jury believe, from the evidence, that any other person might have inflicted the wounds which caused the death of the deceased during the last struggle at Mrs. Foley's, they are bound to give the defendant the benefit of any doubt raised thereby.²

5. If the jury believe, from the evidence, that the defendant did not seek to renew the fight, but, in good faith, sought to decline it, and that he was pursued and assaulted by the deceased in such a way as to induce in said defendant a reasonable and well-grounded belief that he was actually in danger of losing his life or suffering great bodily harm from the said deceased, and that, acting under such reasonable apprehension, and for the purpose of protecting himself, he inflicted wounds upon the said deceased which resulted in his death, then the jury must acquit the defendant.³

6. The jury are instructed that unless they believe, from the evidence, that the wounds inflicted upon the deceased were made with a knife or some weapon capable of producing them, in the hands of the defendant, the defendant must be acquitted.⁴

7. The defendant is entitled to all reasonable doubts that may exist as to the guilt of the defendant.⁵

8. The jury are the judges of the law and the fact.⁶

FORM OF AN INSTRUCTION AS TO THE JURORS BEING JUDGES OF THE
LAW AND FACTS.⁷

The court instructs you that you are the judges of the law and facts of the case, and that you are not bound by the opinion of the court as to what the law is.

§ 966. **Marking Instructions — Modifying.** — The statute provides that "when instructions are asked which the judge

¹ This instruction is as modified. *Reins v. People*, 30 Ills., 263.

² This instruction was given as asked. *Reins v. People*, 30 Ills., 262.

³ This instruction is as modified. *Reins v. People*, 30 Ills., 264.

⁴ This instruction is as modified. *Reins v. People*, 30 Ills., 264.

⁵ This instruction was given as asked. *Reins v. People*, 30 Ills., 264.

⁶ *Id.*

⁷ Approved in *Schnier v. People* 23 Ills., 29; see also *Fisher v. People*, 23 Ills., 293; *Reins v. People*, 30 Ills., 263.

cannot give, he shall on the margin thereof write the word 'refused;' and such as he approves he shall write on the margin thereof the word 'given;' and he shall in no case, after instructions are given, qualify, modify, or in any manner explain the same to the jury otherwise than in writing."¹

§ 967. **Exceptions.** — "Exceptions to giving or refusing any instruction may be entered at any time before the entry of final judgment in the case."²

§ 968. **Instructions Taken by the Jury.** — "And such instructions so given shall be taken by the jury in their retirement, and returned by them with their verdict into court."³

§ 969. **Papers, etc., may be Taken by the Jury.** — "Papers read in evidence other than depositions may be carried from the bar by the jury."⁴

§ 970. **Exceptions to Instructions** must be taken in the court below, or they cannot be made available in the appellate court.⁵

7. RETIRING OF THE JURY TO DELIBERATE OF THEIR VERDICT.

§ 971. **When Jury must be in Charge of a Sworn Officer.** — The statute is peremptory that upon the trial of a party charged with crime, when the jury retire to deliberate upon their verdict they must be placed in charge of a sworn officer.⁶ If this requirement is omitted without the consent of the accused it will be a ground for the reversal of the judgment of conviction.⁷ There is no exception to this rule, except in cases of misdemeanors, where the parties by agreement may dispense with the requirement; but even in such cases the agreement must not only be made, but the court is required to enter it upon its minutes.⁸

¹ R. S., 781, § 54.

² Id.

³ Id., § 55.

⁴ Id., § 56.

⁵ *Gulliver v. Adams Exp. Co.*, 38 Ills., 502.

⁶ R. S., 411, § 435.

⁷ *McIntyre v. People*, 38 Ills., 514; *Lewis v. People*, 44 Ills., 452.

⁸ R. S., 411, § 435; *McIntyre v. People*, 38 Ills., 514.

FORM OF OATH OF ATTENDING OFFICER ON THE RETIRING OF THE JURY
TO DELIBERATE OF THE VERDICT.

You do swear by the ever-living God (*or "you do solemnly, sincerely and truly declare and affirm"*) that you will well and truly attend the jury to some private and convenient place, and to the best of your ability keep them together without meat or drink (water excepted) unless by leave of the court, until they shall have agreed upon their verdict, nor suffer others to speak to them, and that when they shall have agreed upon their verdict you will return them into court.

§ 972. **Misconduct of the Officer in Charge of the Jury.** — The misconduct of the officer having the jury in charge in making remarks to them,¹ in permitting others to communicate with them,² in allowing them to separate,³ or in permitting them to drink spirituous liquors,⁴ if it appears affirmatively that the prisoner was not prejudiced thereby,⁵ will not vitiate the verdict, but the officer should be punished therefor by the court.⁶

§ 973. **Jury Judges of the Law and Fact.** — Under our statute jurors in a criminal case are judges of the law, as well as of the fact, and they have the right to pronounce upon the law as it may seem in their opinion to be,⁷ and are not bound by the instructions of the court.⁸

§ 974. **Sealing Verdict and Separation of the Jury.** — In a criminal case not capital it is not error for the court by the agreement or consent of the parties entered upon its minutes⁹ to

¹ *Reins v. People*, 30 Ills., 274.

² *Martin v. People*, 54 Ills., 225; *Adams v. People*, 47 Ills., 381; *Fisher v. People*, 23 Ills., 283.

³ *Miller v. People*, 39 Ills., 467.

⁴ *Davis v. People*, 19 Ills., 74.

⁵ *Jumpretz v. People*, 21 Ills., 411; *McKinney v. People*, 2 Gilm., 253; *Russel v. People*, 44 Ills., 508.

⁶ *Miller v. People*, 39 Ills., 467; *Davis v. People*, 19 Ills., 74; *Reins v. People*, 30 Ills., 256.

⁷ *R. S.*, 411, § 431; *Adams v. People*, 47 Ills., 378; *Falk v. People*, 42 Ills., 331.

⁸ *Schnier v. People*, 23 Ills., 29; *Fisher v. People*, 23 Ills., 283; *contra*, 1 Arch. C. P. & Pl., 661; *Whart. Cr. L.*, § 3094, and authorities cited; *Com. v. Anthes*, 5 Gray, 185.

⁹ *McIntyre v. People*, 38 Ills., 514; *contra*, *Nomaque v. People*, *Breese*, 109, 2nd Ed., 145.

direct the jury that if they should agree upon their verdict before the assembling of the court on the following day, they may sign and seal the same and separate if they chose, and return with their verdict sealed into the court upon the assembling thereof on the following day;¹ but if they separate without reducing their verdict to writing and sealing it up according to the order of the court, it will be invalid;² but if they separate without agreeing upon a verdict they must be discharged and should not be sent out again, for it would be error to receive any verdict which they then might render.³ Where on the trial of a party charged with larceny, the parties agreed that the jury might seal their verdict and separate, and if the verdict should be defective it might be amended and the jury found their verdict, sealed it, left it with the clerk and separated, and it, when opened next day, was found to be defective in not finding the value of the property stolen, it was held that the agreement as to the amendment unless otherwise expressed applied only to matters of form and not to substance, and the value of the property was substance, for upon it depended the grade of the offense and the punishment; and that it was error three days after the jury had agreed to their verdict and separated to get them together and have them supply the defect.⁴ A prisoner has a right to the presence of the jury when they deliver their verdict, as he is entitled to have them polled, and a verdict is not final until pronounced and recorded in open court.⁵

8. THE VERDICT.

§ 975. Penalties Determined by the Jury—Penitentiary.—The statute provides that “in all cases where the punishment shall be confinement in the penitentiary, if the case is tried by a

¹ *Reins v. People*, 30 Ills., 273; *Com. v. Carrington*, 116 Mass., 37.

² *Com. v. Downs*, 108 Mass., 488; *White v. Martin*, 2 Scam., 69.

³ *White v. Martin*, 2 Scam., 70.

⁴ *Williams v. People*, 44 Ills., 478.

⁵ *Nomaque v. People*, Breese, 109, 2d Ed., 145.

jury, the jury shall say in their verdict for what time the offender shall be confined, and the court, in pronouncing sentence, shall designate what portion of time the offender shall be confined to solitary imprisonment, and what portion to hard labor.”¹

§ 976. **Fines Fixed by the Jury.**—“When a fine is also to be inflicted, the jury shall fix the amount of the fine. When either fine or imprisonment in the penitentiary may be inflicted, the jury shall determine which, and the time of confinement or the amount of the fine.”²

§ 977. **Penalties to be Fixed by the Court.**—“When the punishment may be either by imprisonment in the penitentiary or by confinement in the county jail, with or without fine, if the jury will not inflict the punishment of imprisonment in the penitentiary, they shall simply find the accused guilty, and the court shall fix the time of confinement in the jail, or fine, or both, as the case may require.”³

§ 978. **Conviction of Lesser Offense.**—The jury may acquit the prisoner of the higher offense charged and convict him of the lesser which is included in the higher, although there be no count in the indictment specifically charging the lesser offense.⁴ But under an indictment with intent to commit murder or mayhem, the defendant cannot be convicted of an assault with intent to commit a bodily injury.⁵

§ 979. **Verdict where Some of the Counts are Faulty.**—Where there are several counts in an indictment, some good and some faulty, and a general verdict of guilty is found, it will be referred to the good counts unless it otherwise states, and will sustain a judgment of conviction.⁶

§ 980. **Verdict, when Sufficient.**—A general verdict of “guilty” is sufficient without specifying of what offense either by des-

¹ R. S., 412, § 444.

² Id., 413, § 445.

³ Id., § 446.

⁴ *Carpenter v. People*, 4 Scam., 197.

⁵ Id.

⁶ *Hiner v. People*, 34 Ills., 297; *Townsend v. People*, 3 Scam., 326; *contra*, *State v. Posey*, 7 Richardson, 484; *State v. Montague*, 2 McCord, 257.

cription by reference to the indictment or otherwise. It is understood to mean guilty of the offense charged in the indictment.¹ If the indictment contains several counts such verdict is a finding upon all of them.² A verdict of guilty as to one count without noticing the others is sufficient.³ Where the jury, in addition to finding the defendant guilty and fixing his term of imprisonment in the penitentiary, also inserted in their verdict the words "together with a fine of one hundred dollars," in a case where they had no authority to assess a fine against the defendant, it was held that these words did not vitiate the verdict, but might be rejected as surplusage.⁴ The verdict of a jury in a criminal case is sufficient if the verdict and the proper judgment to be rendered upon it can be pleaded in bar of another indictment for the same act.⁵ If the jury upon the trial of an indictment for a misdemeanor instead of finding the defendant guilty say "We fine the defendants ten dollars each," the verdict will not authorize a judgment against the parties charged.⁶

§ 981. **Verdict in a Case of Larceny must Find the Value of the Property Stolen**, for the omission to find such value is a defect in substance⁷ which furnishes a good ground for a new trial,⁸ or a motion in arrest of judgment.⁹ Where an indictment charged the defendant with stealing twelve hundred and seventy dollars in current bank bills of the value of \$1,270, and the jury found him "guilty of larceny of twelve hundred and seventy dollars as charged in the indictment," the verdict

¹ *Eyman v. People*, 1 Gilm., 4; *Bond v. People*, 39 Ills., 26; *Davis v. People*, 50 Ills., 200.

² *Armstrong v. People*, 37 Ills., 459; *contra*, *State v. Montague*, 2 McCord, 257; *Com. v. Briggs*, 5 Pick. 429.

³ *Stoltz v. People*, 4 Scam., 168; *Chambers v. People*, 4 Scam., 352

⁴ *Armstrong v. People*, 37 Ills., 459.

⁵ *Chambers v. People*, 4 Scam., 352.

⁶ *Wynn v. State*, 1 Blackf., 28.

⁷ *Williams v. People*, 44 Ills., 478.

⁸ *Id.*; *Collins v. People*, 39 Ills., 234; *Sawyer v. People*, 3 Gilm., 53; *Com. v. Smith*, 2 Va. Cas., 327.

⁹ *Id.*; *Highland v. People*, 1 Scam., 392.

was held sufficient.¹ A verdict in these words "We, the jury, find the defendant guilty of taking the money in the indictment mentioned, and fix the amount and value of the same at \$127.80," is sufficient.²

§ 982. **Verdict in a Case of Murder, how Affected by the Intoxication of the Accused.** — As under our statute it belongs to the jury to fix the punishment for murder, which may be either death by hanging or imprisonment in the penitentiary for life or for a term not less than fourteen years, it is competent to prove on the trial that the accused was intoxicated at the time of the homicide, as showing his condition, and in that respect it constitutes a part of the *res gestæ*, to enable the jury intelligently to graduate the punishment. But proof of intoxication an hour or so before the commission of the homicide is not admissible.³

9. RECEPTION OF THE VERDICT.

§ 983. **When Verdict may be Received.** — A verdict in a capital case may be received, although the judge may have announced an adjournment, if presented by the jury immediately afterwards,⁴ or at any time during the interval between the adjournment of the court and its meeting again in the pursuance of such adjournment,⁵ or on Sunday,⁶ the receiving of the verdict being only a ministerial act.⁷ But the verdict after adjournment before the court has again convened cannot be received and the jury discharged in the absence of the defendant and his counsel.⁸

§ 984. **Reception of the Verdict.** — The statute provides that "it shall be sufficient for the jury to pronounce their verdict

¹ *Hildreth v. People*, 32 Ills., 36.

² *State v. Bond*, 8 Iowa, 540.

³ *Rafferty v. People*, 66 Ills., 118.

⁴ *People v. Green*, 16 Ills., 234.

⁵ *McIntyre v. People*, 38 Ills., 521; but see *City of Chicago v. Rogers*, 61 Ills., 188.

⁶ *Baxter v. People*, 3 Gilm., 368.

⁷ *Id.*; *McIntyre v. People*, 38 Ills., 521.

⁸ *City of Chicago v. Rogers*, 61 Ills., 188.

by their foreman in open court without reducing the same to writing, and the clerk shall enter the same in form under the direction of the court."¹

§ 985. **Polling the Jury.**—Upon the coming in of a jury with a verdict, or after it has been amended by the court, either party has the legal right to have the jury polled, and ask them severally if such was their verdict, and if any of them dissent, the verdict cannot be received,² or if received a new trial will be granted.³

10. AMENDMENT OF THE VERDICT.

§ 986. **When Permitted.**—The verdict cannot be amended in substance after the final discharge of the jury, even though the jury are called together again and make the amendment themselves.⁴ But the court may reduce a verdict correct in substance to the proper form of its own motion,⁵ and before they are discharged may send them out to correct their verdict.⁶ After the verdict is recorded and the jury are discharged their powers terminate⁷ and the verdict cannot be altered or amended, or impeached even by the jurors.⁸

11. MOTION FOR A NEW TRIAL.

§ 987. **Provisions of the Statute.**—The statute provides that

¹ R. S., 781, § 57.

² *Fox v. Smith*, 3 Cowen, 23; *Jackson v. Hawks*, 2 Wen., 619; *Root v. Sherwood*, 6 John., 68; *Lawrence v. Stearns*, 11 Pick., 501; *Johnson v. Howe*, 2 Gilm., 342; *Rigg v. Cook*, 4 Gilm., 336; *Nomaque v. People*, Breese, 109, 2d Ed., 145.

³ *State v. Hardin*, 1 Bailey, 3.

⁴ *Williams v. People*, 44 Ills., 478; *Sargent v. State*, 11 Ohio, 477; *Rigg v. Cook*, 4 Gilm., 436; *Wilcoxon v. Roby*, 3 Gilm., 475; *Mills' Case*, 7 Leigh, 751; *Sargent v. State*, Bank, 11 Ohio, 472.

⁵ *O'Brien v. Palmer*, 49 Ills., 72; *Hartford Ins. Co. v. Van Duzor*, 49 Ills., 489; *Boynton v. Phelps*, 52 Ills., 210; *Faulk v. Kellums*, 54 Ills., 187; *contra*, *Com. v. Gibson*, 2 Va. Cas. 70.

⁶ *Flinn v. Barlow*, 16 Ills., 39; *Bissell v. Ryan*, 23 Ills., 572; *Martin v. Morelock*, 32 Ills., 485; *Smith v. Williams*, 22 Ills., 357; but see *White v. Martin*, 2 Scam., 69.

⁷ *Williams v. People*, 44 Ills., 478.

⁸ *Mercer v. State*, 17 Ga., 146; but see *Cockran v. State*, 7 Humph., 544.

"if either party may wish to except to the verdict or for other causes to move for a new trial or in arrest of judgment, he shall, before final judgment be entered, or during the term it is entered by himself or counsel, file the points in writing, particularly specifying the grounds of such motion, and final judgment shall thereupon be stayed until such motion can be heard by the court. But no more than two new trials upon the same grounds shall be granted to the same party in the same cause, nor shall any verdict or judgment be set aside for irregularity only, unless cause be shown for the same, during the setting of the court at the term such verdict or judgment shall be given. In all cases where a new trial shall be granted on account of improper instructions having been given by the judge, or improper evidence admitted, or because the verdict of the jury is contrary to the weight of the evidence, or for any other cause not the fault of the party applying for such new trial, said new trial shall be granted without costs, and as of right."¹ By another statute it is provided "that in no criminal case shall the people be allowed an appeal writ of error or a new trial."²

FORM OF POINTS SPECIFYING GROUNDS OF MOTION FOR A NEW TRIAL.³

C. D. ads.	}	
The People of the State of Illinois.	}	And now after verdict and before sentence the said C. D., defendant in the above entitled action, by E. F., his counsel, comes and moves the court to set aside the verdict of the jury and for a new trial in said cause, upon the grounds ⁴ and for the rea- sons following, <i>to wit</i> :

1. The court erred in giving instructions for the people asked by the state's attorney, and each and every one of them.

2. The court erred in not giving the first instruction asked for by the defendant.

¹ R. S., 781, § 57.

² R. S., 411, § 437; *State v. Johnson*, 2 Iowa, 549; *State v. Baker*, 19 Mo., 683.

³ Taken from *Reins v. People*, 30 Ills., 265. The form may be varied to meet the facts of each case.

⁴ It is not error to deny the motion if the grounds are not stated, *Mingia v. People*, 54 Ills., 274; or are stated orally, *Nutter v. State*, 9 Port. Ind., 187; *Gillespie v. State*, 9 Port. Ind., 380.

3. The court erred in modifying the second, third, fifth and sixth instructions asked for by the defendant.

4. The court erred in allowing the jury without the consent of the defendant to seal their verdict and separate before the same was returned into court.

E. F., Counsel for Defendant.

§ 988. **Motion in Arrest of Judgment, when a Waiver of a Motion for a New Trial.** — According to some of the authorities a motion in arrest of judgment is a waiver of a motion for a new trial.¹ But where a motion for a new trial is first duly made, and afterwards a motion in arrest of judgment is also made, there seems to be no good reason why both should not be heard together, or the one or the other considered first according to the circumstances of the case² as is now the practice in some of the courts.³ If it appears that manifest injustice will ensue from a strict observance of the rule forbidding the hearing of a motion for a new trial after a motion in arrest of judgment, the court should waive the formality and admit the defendant to a rehearing. And this indulgence will sometimes be granted, especially if it appears that he was not acquainted with the cause which induces him thus to apply until after he has moved in arrest of judgment.⁴ The motion for a new trial is waived if the defendant makes a motion in arrest of judgment which is overruled and neglects to call up the motion for a new trial before final judgment is rendered.⁵

§ 989. **Admitting Improper Evidence.** — It is a ground for a new trial that the judge improperly admitted material evidence against the prisoner on his trial after objection by his counsel;⁶

¹ 1 Chitty Cr. L., 658; 1 Arch. C. P. & Pl., 669; 2 Whart., § 3225; Hall v. Nees, 27 Ills., 413.

² Com. v. Peck, 1 Met., 428.

³ 1 Chitty Cr. L., 658; 2 Whart. Cr. L., § 3225; Rex v. Mawbry, 6 Term., 627; McComas v. State, 11 Mo., 116; Rex v. Rowland, 2 Den. C. C., 386.

⁴ 1 Chitty Cr. L., 658; 2 Whart. Cr. L., § 3225; Rex v. Gough, 2 Doug., 797.

⁵ Hall v. Nees, 27 Ills., 413.

⁶ 2 Whart. Cr. L., § 3089; People v. Spooner, 1 Denio, 343; Andrews v. People, 60 Ills., 354; State v. Allen, 1 Hawks, 6; Com. v. Green, 17 Mass., 515; Peck v. State, 2 Humph., 78; State v. Ford, 3 Strobb., 517; State v. Engle, 1 Zab., 347; Com. v. Bosworth, 22 Pick., 397; State v. Clark, 12 Ired.,

but a new trial will not be granted for admitting improper evidence where it appears from the whole record that substantial justice has been done,¹ or that there is sufficient legal evidence uncontradicted to sustain the verdict,² or that there is no reason to suppose that such evidence has had an influence on the minds of the jurors,³ or that the effect of such evidence was so far restrained by instructions that it could not affect the verdict,⁴ or that such evidence was received without objection.⁵ Where, after the retirement of the jury, a pistol which had been shown to them on the trial was sent to them without the knowledge of the prisoner, his counsel or the court, and they experimented with it for the purpose of judging whether under the circumstances proven the deceased could have shot himself with that weapon, it was held that because the pistol was allowed to go to the jury without having been properly identified as the one by means of which the deceased was killed and without the prisoner's consent, a new trial ought to have been granted.⁶

§ 990. **Improperly Rejecting Evidence.**—The rejection of evidence tending in any degree to aid the jury in determining a material fact is a ground for a new trial.⁷ Where evidence

151; *State v. Merrill*, 2 Dev., 269; *Com. v. Renish*, Thatch. Cr. C., 684; *People v. Restell*, 3 Hill, 289; *People v. White*, 14 Wen., 111; *Yates v. People*, 38 Ills., 527; *Miller v. People*, 39 Ills., 459; *Rowley v. Hughes*, 40 Ills., 316; *Weeks v. Louerrie*, 8 Barb., 530; *Dresser v. Ainsworth*, 9 Barb., 619.

¹ *Bird v. State*, 14 Ga., 43; *C. B. & Q. R. R. Co. v. Gregory*, 58 Ills., 274; *Boynton v. Phelps*, 52 Ills., 221; *Com. v. Eberle*, 3 Serg. & R., 14; *Com. v. Gallagher*, 4 Penn. Law Jour., 516; *contra*, 2 Whart. Cr. L., § 3090; *Peck v. State*, 2 Humph., 78; *People v. Williams*, 18 Cal., 187.

² *Schultz v. Lepage*, 21 Ills., 160.

³ *Com. v. Bosworth*, 22 Pick., 397; *City of Champaign v. Patterson*, 50 Ills., 61; *Rex v. Teal*, 11 East, 307.

⁴ *City of Champaign v. Patterson*, 50 Ills., 61.

⁵ *Snyder v. Laframboise*, Breese, 271, 2d Ed., 343; *Stone v. State*, 4 Humph., 27; *State v. Gordon*, 1 Rhode Island, 179; *State v. Camp*, 23 Vt., 551.

⁶ *Yates v. People*, 38 Ills., 528.

⁷ *Coleman v. Allen*, 3 J. J. Marsh, 229; *Young v. Buckingham*, 5 Ohio, 485; *Carter v. People*, 2 Hill, 317; *Flood v. Prettyman*, 24 Ills., 597; *Cornelius v. Com.*, 15 B. Monr., 539, 547.

is rejected when it is tendered for one purpose and it is inadmissible for that purpose, but is admissible for another purpose not stated at the trial, the court will not grant a new trial for the reason that the purpose for which the evidence was admissible was not pointed out to the court at the proper time.¹ After the evidence has once been declared to be closed by the parties it is entirely in the discretion of the court whether it will receive further evidence or not, and therefore the refusal to receive additional evidence after that time is not a ground for a new trial.² So where the examination of a witness has been declared closed, it is a matter of discretion whether after he is dismissed from the stand he shall be examined further or not, and the refusal of the court to permit a further examination of the witness is not a ground for a new trial.³ An objection because proper evidence is not received may be waived. Therefore where a prisoner offered a witness who was so much intoxicated as to be incapable of understanding the obligation of an oath, and for that reason the court would not permit him to be sworn, but told the prisoner he might recall him when he was sober, which the prisoner omitted to do, it was held that this was no cause in law for granting a new trial.⁴

§ 991. **Giving Improper, or Refusing to Give Proper, Instructions.**—Any misdirection of the court trying the case in point of law, on matters material to the issue, is a good ground for a new trial.⁵ Yet where one of a series of instructions stand-

¹ *Rex v. Grant*, 3 Nev. & Man., 106; *Barksdale v. Toomer*, 2 Bailey, 180.

² *Moore's Civil Pr.*, § 560; *Rowley v. Hughes*, 40 Ills., 316; *Wilborn v. Odell*, 29 Ills., 456; *Goodrich v. City of Minock*, 62 Ills., 122; *Sprague v. Craig*, 51 Ills., 289; *Seely v. Pelton*, 63 Ills., 104; *Welsh v. People*, 17 Ills., 339.

³ *Moores Civil Pr.*, § 596; *Brown v. Berry*, 47 Ills., 175; *People v. Mather*, 4 Wen., 249.

⁴ *State v. Underwood*, 6 Ired., 96.

⁵ 1 Arch. C. P. & Pl., 643; *People v. Thomas*, 3 Hill, 169; *People v. Cogdell*, 1 Hill, 94; *C. B. & Q. R. R. Co. v. Dunn*, 61 Ills., 386; *People v. Bodine*, 1 Denio, 282; *State v. Somerville*, 21 Me., 20; *Reins v. People*, 30 Ills., 257; *Jupetz v. People*, 34 Ills., 516; *Conkright v. People*, 35 Ills., 204; *Bond v. People*, 39 Ills., 233; *Higgins v. Lee*, 16 Ills., 495.

ing alone would be erroneous, is so explained by others as to render it free from objection, a new trial will not be granted because such instruction was given,¹ unless it appears that the erroneous instruction may have misled the jury.² Although in criminal cases, jurors are judges of the law as well as fact, still the neglect or refusal of the court to give such instructions as are material, properly drawn and correctly state the law applicable to the case, when requested, is a good cause for a new trial.³ But where substantial justice has been done, a new trial will not be granted, for the reason that an erroneous instruction was given,⁴ or a proper instruction was refused.⁵ Where the instruction is as favorable to the party as the law will authorize, and even more so, he cannot allege that it is erroneous.⁶ A new trial will not be granted

¹ *Springdale Cemetery Association v. Smith*, 24 Ills., 480; *Murphy v. People*, 37 Ills., 447; *Kennedy v. People*, 40 Ills., 438; *Lawrence v. Hagerman*, 56 Ills., 70; *Eubanks v. People*, 41 Ills., 486; *Walker v. Collier*, 37 Ills., 362; *Yundt v. Hartrunft*, 41 Ills., 9; *Van Buskirk v. Day*, 32 Ills., 26; *Morgan v. Peet*, 30 Ills., 281; *Durham v. Goodwin*, 54 Ills., 469; *contra*, *C. & A. R. R. Co. v. Murray*, 62 Ills., 327.

² *Baldwin v. Killian*, 63 Ills., 550; *Ills. Cen. R. R. Co. v. Maffet*, 67 Ills., 431; *C. B. & Q. R. R. Co. v. Dunn*, 61 Ills., 386.

³ *State v. Wilson*, 2 Scam., 225; *Barney v. People*, 22 Ills., 160; *Fisher v. People*, 23 Ills., 283; *Reins v. People*, 30 Ills., 275; *Higgins v. Lee*, 16 Ills., 495.

⁴ *Pate v. People*, 3 Gilm., 644; *Leigh v. Hodges*, 3 Scam., 15; *Gillett v. Sweat*, 1 Gilm., 475; *Johnson v. State*, 30 Ga., 426; *Newkirk v. Cone*, 18 Ills., 449; *Howard F. & M. Ins. Co. v. Cornick*, 24 Ills., 455, 554; *New Elg. F. & M. Ins. Co. v. Wetmore*, 32 Ills., 221; *C. & A. R. R. Co. v. Sullivan*, 63 Ills., 294; *C. R. I. & P. R. R. Co. v. Herring*, 57 Ills., 59; *Parker v. Fisher*, 39 Ills., 164; *Potter v. Potter*, 41 Ills., 81; *Watson v. Woolverton*, 41 Ills., 242; *Clark v. Pageter*, 45 Ills., 185; *Jarrard v. Harper*, 42 Ills., 457; *State v. Lawrence*, 38 Iowa, 52; *Pahlman v. King*, 49 Ills., 266; *Rankin v. Taylor*, 49 Ills., 451; *People v. Robinson*, 2 Park. Cr. R., 235; *Skinner v. State*, 30 Ala., 524; *People v. Reynolds*, 2 Mich., 422; *Miller v. Bryan*, 3 Iowa, 58; *State v. Carnahan*, 17 Iowa, 256; *McConnell v. Kibbie*, 33 Ills., 177; *Curtis v. Sage*, 35 Ills., 22; *Coursen v. Ely*, 37 Ills., 338; *Root v. Curtis*, 38 Ills., 192; *Boynton v. Holmes*, 38 Ills., 59.

⁵ *Schwarz v. Schwarz*, 26 Ills., 81; *Hall v. Sroufe*, 52 Ills., 421; *Elam v. Badger*, 23 Ills., 498; *Lawrence v. Jarvis*, 32 Ills., 305; *People v. Gray*, 5 Wen., 289.

⁶ *Ills. Cen. R. R. Co. v. Munn*, 51 Ills., 78.

because instructions were not modified if the modification was not asked;¹ but where an instruction is erroneously modified and then given, the judgment will be reversed if the party is prejudiced thereby.² In a capital case where the instructions given by the court do not announce correct legal principles, or being correct, are inapplicable to the case though no exceptions are taken to them, the appellate court in the face of the record will not pronounce sentence of death upon the prisoner, but will award a new trial.³

§ 992. **Verdict against Law and Evidence.** — A new trial may be granted in a criminal case when the verdict is against law,⁴ is without evidence,⁵ or is manifestly against the weight of evidence.⁶ The rule that an appellate court will not interfere to set aside a verdict unless it is manifestly against the weight of evidence obtains in the largest sense in civil cases, but is not applied to the same extent in criminal cases, especial where life is at stake.⁷ Where the evidence is conflicting and the question is one of doubt, the court should not, as a general rule, grant a new trial,⁸ even though there is a difference of opinion between the court and the jury as to the conclusion to be drawn from the evidence or as to the credit due to the wit-

¹ *State v. Tweedy*, 11 Iowa, 350.

² *State v. Greene*, 20 Iowa, 424.

³ *Falk v. People*, 42 Ills., 332.

⁴ *Dailey v. State*, 10 Ind., 536; *State v. Croteau*, 23 Vt., 14; *State v. Sims*, Dudley Ga., 213; *Townsend v. State*, 2 Blackf., 151; *U. S. v. Battiste*, 2 Sumner, 240, 242; *Falk v. People*, 42 Ills., 334; *Higgins v. Lee*, 16 Ills., 500.

⁵ *State v. Anderson*, 2 Bailey, 565; *Bedford v. State*, 5 Humph., 553; *Com. v. Briggs*, 5 Pick., 429; *Ball v. Com.*, 8 Leigh, 726; *Holman v. State*, 8 Engl. Ark., 105; *State v. Hardy*, Dud., 226; *Randall v. People*, 63 Ills., 202; *State v. Stewart*, 6 Conn., 47.

⁶ *State v. Lyon*, 12 Conn., 487; *State v. Fisher*, 2 Nott & McC., 261; *State v. Bird*, 1 Mo., 585; *People v. San Martin*, 2 Cal., 484; *Keaggy v. Hite*, 12 Ills., 99; *Grayson v. Com.*, 7 Grat., 613.

⁷ *Falk v. People*, 42 Ills., 332; *Dains v. State*, 2 Humph., 442; *Bedford v. State*, 5 Humph., 552; *Copeland v. State*, 7 Humph., 479; *Cochran v. State*, 7 Humph., 544.

⁸ 2 Whart. Cr. L., § 3110; *Bennett v. State*, 8 Engl., 694; *Bromley v. People*, 27 Ills., 20; *Wilson v. People*, 26 Ills., 434; *Dunning v. Fitch*, 66 Ills., 51; *C. R. I. & P. R. R. Co. v. Reidy*, 66 Ills., 44; *Cass v. Campbell*, 63 Ills.,

nesses.¹ Where it is apparent that the jury either mistook the evidence, or that they misunderstood the law applicable to the evidence,² or that the facts of the case are too doubtful to warrant a conviction,³ a new trial should be granted.

§ 993. **Newly Discovered Evidence.**—A new trial will not be granted to afford a party an opportunity to introduce newly discovered testimony which is not conclusive in its character, but only cumulative.⁴ To justify the granting of a new trial on the ground of newly discovered evidence, it must appear that such evidence could not have been procured by ordinary diligence;⁵ that it has been discovered since the former

259; *State v. Lamont*, 2 Wis., 437; *Dufield v. Cross*, 13 Ills., 699; *Dawson v. Robbins*, 5 Gilm., 72; *Giles v. State*, 6 Ga., 276; *Wickersham v. People*, 1 Scam., 130; *Campbell v. State*, 11 Ga., 353; *Welden v. Frances*, 12 Ills., 460; *Johnson v. Moulton*, 1 Scam., 533; *State v. Sims*, 2 Bailey, 29; *State v. Hooper*, 2 Bailey, 37; *State v. Anderson*, 2 Bailey, 565; *Webster v. Vickers*, 2 Scam., 295; *Eldridge v. Huntington*, 2 Scam., 535; *Glory v. State*, 8 Engl. Ark., 236; *Bevans v. State*, 6 Engl. Ark., 455; *Mains v. State*, 8 Engl. Ark., 285.

¹ *Sullivan v. Dollins*, 13 Ills., 85; *McLane v. State*, 4 Ga., 335; *State v. Moody*, 24 Mo., 560; *Kincaid v. Turner*, 2 Gilm., 621; *Blanchard v. Morris*, 15 Ills., 35; *State v. Jeffrey*, 3 Murphey, 480; *State v. Anderson*, 19 Mo., 241; *Pleasant v. State*, 15 Ark., 624; *Williams v. Vanderbilt*, 29 Barb., 491; *Ledley v. State*, 4 Port. Ind., 580; *Gibson v. State*, 9 Port. Ind., 264; *Weinzorpfli v. State*, 7 Blackf., 816; *Keithler v. State*, 10 Sm. & M., 192; *State v. Fisher*, 2 Nott & McC., 261.

² *Gordon v. Crooks*, 11 Ills., 142; *Searls v. People*, 13 Ills., 697; *Scott v. Plumb*, 2 Gilm., 595; *Higgins v. Lee*, 16 Ills., 495.

³ *Chase v. Debolt*, 2 Gilm., 371; *Boyle v. Levings*, 24 Ills., 223; *Clement v. Bushway*, 25 Ills., 200; *Dains v. State*, 2 Humph., 439; *Bedford v. State*, 5 Humph., 552; *Leake v. State*, 10 Humph., 144; *State v. Hammond*, 2 Strob., 91; *Garland v. State*, 2 Swan, 18; *State v. Rabon*, 4 Rich., 260; *State v. Wood*, 1 Mills, 9.

⁴ 2 Whart. Cr. L., 3179; *Fuller v. Little*, 60 Ills., 28; *Bowen v. Rutherford*, 60 Ills., 41; *Com. v. Flanigan*, 7 Watts & Serg., 415; *Com. v. Murray*, 2 Ashm., 41; *State v. Larimore*, 20 Mo., 425; *Giles v. State*, 10 Ga., 511; *Adams v. People*, 47 Ills., 380; *Smith v. Shultz*, 1 Scam., 491; *Morrison v. Stewart*, 24 Ills., 25; *T. W. & W. R. Co. v. Sitz*, 53 Ill., 452; *State v. Carr*, 1 Fost., 166; *Roberts v. State*, 3 Kelley, 310; *Martin v. Ehrenfels*, 24 Ills., 189; *Sulzer v. Yott*, 57 Ills., 164.

⁵ 2 Whart., § 3170b; *Lafin v. Herrington*, 17 Ills., 399; *Schleucker v. Risley*, 3 Scam., 483; *Crozier v. Cooper*, 14 Ills., 139; *Bowen v. Rutherford*, 60 Ills., 41; *Stetham v. Shoults*, 17 Ills., 99; *Calhoun v. O'Neil*, 53

trial;¹ that the evidence is material and if brought before another jury, would likely change the result;² that it does not prove a merely technical defense;³ that it is true;⁴ and the application must be supported by the affidavit of the prisoner stating the names of the witnesses,⁵ and the affidavit of each of the proposed witnesses, stating therein what he will testify, or some excuse must be shown for not obtaining it.⁶ A new trial will not be granted on the ground of newly discovered testimony if the only object of the evidence is to impeach the credit or character of the witness.⁷ It has been held that

Ills., 354; *State v. Carr*, 1 *Post.*, 166; *U. S. v. Gilbert*, 2 *Sumner*, 19; *People v. Mack*, 2 *Park. Cr. R.*, 673; *People v. Vermilyea*, 7 *Cowen*, 368; *Friar v. State*, 7 *How. Missis.*, 365; *Bennett v. Com.*, 8 *Leigh*, 745; *Thompson v. Com.*, 8 *Grat.*, 637; *Com v. Benesh*, *Thatch. Cr. C.*, 684; *Lester v. State*, 11 *Conn.*, 415; *Roberts v. State*, 3 *Kelley*, 310; *Gilbert v. State*, 7 *Humph.*, 524; *Com. v. Williams*, 2 *Ashm.*, 69; *State v. Harding*, *Bay*, 467; *Com. v. Drew*, 4 *Mass.*, 399; *Seem v. McLees*, 24 *Ills.*, 194.

¹ *Com. v. Murray*, 2 *Ashm.*, 41; *Com. v. Williams*, 2 *Ashm.*, 69; *Jackson v. Malin*, 15 *John.*, 293; *Vandervoort v. Smith*, 2 *Cai*, 155; *Hollingsworth v. Napier*, 3 *Cai.*, 182; *Thurtell v. Beaumont*, 8 *Moore*, 612; *Palmer v. Mulligan*, 8 *Moore*, 307; *Vernon v. Hankey*, 2 *T. R.*, 113; *State v. Harding*, 2 *Bay*, 267; *Dixon v. Graham*, 5 *Dow.*, 267; *Doe v. Roe.*, 1 *John. C.*, 402; *Williams v. Baldwin*, 15 *John.*, 489; *Standen v. Edwards*, 1 *Ves. Jr.*, 133; *Bruce v. Truett*, 4 *Scam.*, 454; *Wilson v. People*, 26 *Ills.*, 434.

² *Bixby v. State*, 15 *Barb. Ark.*, 395; *Schlencker v. Risley*, 3 *Scam.*, 483; *Thompson v. Com.*, 8 *Grat.*, 637; *Holeman v. State*, 8 *Engl. Ark.*, 105; *State v. Carr*, 1 *Post.*, 166; *Com. v. Flannigan*, 7 *Watts & Serg.*, 423; *Giles v. State*, 6 *Ga.*, 276; *Com. v. Churchill*, 2 *Met.*, 118; *Henderson v. State*, 12 *Texas*, 525.

³ 2 *Whart. Cr. L.*, §3191; *Com. v. Churchill*, 2 *Met.*, 118.

⁴ *Ritchey v. West*, 23 *Ills.*, 385.

⁵ *Forester v. Guard*, *Breese*, 74.

⁶ *Cowen v. Smith*, 35 *Ills.*, 416; *Mingia v. People*, 54 *Ills.*, 274; *McQueen v. Stewart*, 7 *Port. Ind.*, 264; *Pleasant v. State*, 8 *Engl. Ark.*, 360; *Giles v. State*, 6 *Ga.*, 276; *Berry v. State*, 10 *Ga.*, 511; *Bixby v. State*, 15 *Ark.*, 395; *White v. State*, 17 *Ark.*, 404; *Mingia v. People*, 54 *Ills.*, 274; *Warren v. State*, 1 *Greene Iowa*, 106; *Webber v. Tres.*, 1 *Tyler*, 441.

⁷ 2 *Whart. Cr. L.*, §3184; *Martin v. Ehrenfels*, 24 *Ills.*, 189; *Leving v. State*, 13 *Ga.*, 513; *Deer v. State*, 14 *Mo.*, 348; *Thompson v. Com.*, 8 *Grat.*, 637; *Com. v. Waite*, 5 *Mass.*, 261; *Herber v. State*, 7 *Texas*, 69; *Porter v. State*, 2 *Carter*, 435; *Bland v. State*, 2 *Carter*, 608; *Thompson v. Com.*, 8 *Grat.*, 637; *Leving v. State*, 13 *Ga.*, 358.

where several defendants are tried at the same time, and some are acquitted and others convicted, the court may grant a new trial as to those who are convicted in order that they may have the benefit of the testimony upon such new trial of those who were acquitted, provided they show a case of so much merit and so much diligence as entitle them to a new trial.¹ But probably the courts will hold that the convicted defendants should not be granted a new trial in such case unless an application was made on the first trial after the evidence for the people was closed, to have the jury pass upon the guilt or innocence of the acquitted defendants first, so that the testimony of such defendants then might be introduced in behalf of their co-defendants.² Possibly they would be required to ask a separate trial in order to show diligence in procuring the testimony of their co-defendants.³ A new trial has been granted where the wife of a co-defendant has been made a competent witness by his acquittal.⁴ On a question of diligence arising on an application for a new trial a party must negative every circumstance from which negligence may be inferred.⁵ Where the evidence is not cumulative and its importance could not have been foreseen, and it strengthens the conviction of the court that justice has not been done, a new trial will be granted.⁶ A motion for a new trial will not be heard after judgment has been regularly perfected, although it be on the ground of evidence newly discovered since the judgment.⁷

§ 994. *Affidavits*.—The affidavit of a prisoner upon a motion for a new trial is *prima facie* evidence of the statements it

¹ State v. Ayer, 3 Fost., 301; Campbell v. State, Yerg., 333.

² People v. Vermilyea, 7 Cowen, 369; Cochran v. Ammon, 16 Ills., 316; Sawyer v. Merrill, 10 Pick., 16; U. S. v. Gilbert, 2 Sumner, 20; State v. Bean, 36 N. H., 122.

³ State v. Ayer, 3 Fost., 301.

⁴ Com. v. Manson, 2 Ashm., 30; but see Com. v. Chauncey, 2 Ashm., 90.

⁵ Crozier v. Cooper, 14 Ills., 139; Laffin v. Herrington, 17 Ills., 403.

⁶ Wilder v. Greenlee, 49 Ills., 253.

⁷ Whart. Cr. L., § 3165; Jackson v. Chase, 15 John., 355; Evans v. Rogers, N. & M., 563; Eckfert v. Des Coudres, 1 Rep. Con. Ct., 69.

contains.¹ The affidavits of jurors cannot be received to impeach their own verdict or the verdict of their fellows,² unless they swear they never consented to the verdict.³ But the affidavits of jurors may be received in exculpation of the jurors and in support of their verdict.⁴ A new trial will not be granted upon the affidavit of third persons as to what they have heard the jurors say respecting the verdict.⁵

§ 995. Cases where a New Trial has been Granted.—Where it appeared upon a conviction for manslaughter that the two principal witnesses had sworn differently upon the coroner's inquest from what they did on the trial, which was for murder, and that the latest testimony of these witnesses was not corroborated, but was clouded with suspicion, a new trial was granted.⁶ Where while a witness was testifying in behalf of the people in a capital case, a juror inquired of a bystander who had not been sworn if the statements of the witness were true, a new trial was granted, though no objection was made at the time by the prisoner.⁷ Where the jury were instructed that if they believe from the evidence that such party was guilty of an attempt as charged in the indictment, their verdict should be guilty, a new trial was granted for the reason that the instruction was too vague and misleading.⁸ Where, after

¹ *Guykowski v. People*, 1 Scam., 476; *Sellers v. People*, 3 Scam., 415.

² *People v. Carnal*, 1 Park., 256; *Organ v. State*, 26 Missis., 78; *Bishop v. State*, 9 Ga., 121; *Ward v. State*, 8 Blackf., 101; *State v. Doom*, R. M. Charl., 1; *People v. Baker*, 1 Cal., 403; *U. S. v. Reed*, 12 How. U. S., 361; *State v. Freeman*, 5 Conn., 348; *Martin v. Ehrenfels*, 24 Ills., 187; *Allison v. People*, 45 Ills., 39; *contra*, *Sawyer v. Stephenson*, Breese, 6, 2d Ed., 24; *Crawford v. State*, 2 Yerg., 60; *Cochran v. State*, 7 Humph., 544; *Luster*, 11 Humph., 169; *Booby v. State*, 4 Yerg., 111; *Stone v. State*, 4 Humph., 27; *Hudson v. State*, 9 Yerg., 408.

³ *Smith v. Eams*, 3 Scam., 81; 2 Wash., 79; 3 Burrow, 383.

⁴ *Guykowski v. People*, 1 Scam., 482; *Smith v. Eams*, 3 Scam., 81; *Canon v. State*, 3 Texas, 31; *State v. Ayer*, 3 Foster, 321; *State v. Hascall*, 6 N. H., 352.

⁵ *Stone v. State*, 4 Humph., 27; *Allison v. People*, 45 Ills., 39; *Forester v. Guard*, Breese, 44, 2d Ed., 74.

⁶ *Gibbons v. People*, 23 Ills., 518.

⁷ *Dempsey v. People*, 47 Ills., 323.

⁸ *Preisker v. People*, 47 Ills., 382.

a verdict of guilty of malicious shooting, one of the jurors filed his affidavit in which he stated that he believed that the prisoner was not guilty; that he was induced by some of the jurors to believe that there were fatal defects in some part of the proceedings that would prevent the prisoner from being sent to the penitentiary; that they would find him guilty and recommend him to the mercy of the court, and that that recommendation being sent to the governor would procure his pardon, it was held to be a sufficient cause for granting a new trial.¹ Where the court was satisfied from the whole case that the prisoner, without his fault, had not had a full and impartial hearing, a new trial was granted, although no one thing had transpired which amounted to error in law.²

§ 996. **Cases where a New Trial has been Refused.**—Where, during the progress of a trial for murder, one of the jurors while one of the counsel for the prisoner was addressing the jury had a chill and by the order of the court was placed upon a pallet and for a time did not fully comprehend the whole of the argument, being in a drowse, and it appeared that though the prisoner knew the juror was asleep he omitted to call the attention of anyone to the fact, a new trial was denied.³ Where the accused was indicted and plead by his proper name, Edward McDonald, and the name of the defendant in the indictment was Edward McDonnell, it was held that the variance was not a sufficient cause for granting a new trial.⁴

12. MOTION IN ARREST OF JUDGMENT.

§ 997. **When Made.**—At any time between the conviction and the sentence the defendant may move the court in arrest of judgment.⁵ After sentence has actually been pronounced the court is not required to notice a motion in arrest of judg-

¹ *Cochran v. State*, 7 Humph., 544.

² *Truelock v. State*, 1 Clarke Iowa, 515.

³ *Baxter v. People*, 3 Gilm., 368.

⁴ *McDonald v. People*, 47 Ills., 533.

⁵ 1 Bish. Cr. P., 1108; 1 Arch. C. P. & Pl., 672.

ment;¹ although the court may, without any motion, arrest the judgment² or alter the sentence at any time during the same term.³ A motion in arrest of judgment for the insufficiency of the indictment cannot be entertained after judgment against the defendant on demurrer.⁴

§ 998. **Motion to be in Writing and Specify the Causes of the Arrest.** — The statute requires that a motion in arrest of judgment should be in writing specifying the grounds of such motion.⁵

§ 999. **Causes for.** — The causes on which a motion in arrest of judgment may be grounded are confined to objections which arise upon the face of the record itself,⁶ and which make the proceeding apparently erroneous, and therefore no defect in evidence or improper conduct on the trial can be urged as a ground for arresting the judgment.⁷ Whenever the facts appear on the record, the question of the defendant's right to be discharged from further prosecution can be raised by a motion in arrest of judgment;⁸ for such motion opens the entire record and reaches any defect apparent therein.⁹ If the verdict does not conform to the indictment,¹⁰ or if no

¹ 3 Bur., 1901-1903; 1 Bish. Cr. P., 1110; 1 Arch. C. P. & Pl., 672; but see *ante* § 987.

² 1 East, 146; 11 Harg. St. Tr., 299.

³ 6 East, 328; 1 Bish. Cr. P., 1110; 1 Arch. C. P. & Pl., 672; 1 M. & S., 442.

⁴ 2 Ld. Raym., 1221; 1 Bish. Cr. P., 1110.

⁵ R. S., 411, § 437; *State v. Wing*, 32 Me., 581.

⁶ *State v. Heyward*, 2 Nott & McC., 312; *Com. v. Edwards*, 12 Cush., 187; *Peter v. State*, 11 Texas, 762; *Terrell v. State*, 9 Ga., 58; *State v. Allen*, Charl., 518; *Com. v. Watts*, 4 Leigh, 672; *Jones v. People*, 53 Ills., 366.

⁷ 4 Bur., 2287; 1 Bish. Cr. P., 1108; 1 Arch. C. P. & Pl., 671; *Hooker v. State*, 7 Blackf., 272; *Covey v. State*, 8 Sm. & M., 465; *U. S. v. Dickinson*, 1 Hemp., 1; *McCann v. State*, 9 Sm. & M., 465.

⁸ *Gardiner v. People*, 3 Scam., 84; *Atkins v. State*, 16 Ark., 568; *Com. v. Morse*, 2 Mass., 128; *Brown v. Com.*, 8 Mass., 59; *State v. Bangor*, 38 Me., 592; *State v. Putnam*, 38 Me., 296; *Martin v. State*, 28 Ala., 71; *Tipper v. Cor.*, 1 Met. Ky., 6; *Com. v. Child*, 13 Pick., 198.

⁹ *Gardiner v. People*, 3 Scam., 84.

¹⁰ *State v. Lohmdn*, 3 Hill S. C., 67.

issue has been joined between the people and the defendant,¹ or the record does not show that the indictment on which the conviction was had was returned into open court,² the judgment will be arrested. And judgment has been arrested where it appeared that the case had been tried by thirteen jurors.³ The statute provides that "all exceptions which go merely to the form of an indictment, shall be made before trial, and no motion in arrest of judgment or writ of error shall be sustained for any matter not affecting the real merits of the offense charged in the indictment."⁴ Therefore a motion in arrest of judgment for the insufficiency of an indictment must be predicated upon some intrinsic defect in it, and cannot be sustained for any matter not affecting the real merits of the offense charged.⁵ The omission to state facts sufficient to constitute an offense in an indictment is not cured by a plea of *nolo contendere*,⁶ or by a verdict of guilty, but is a sufficient ground for an arrest of the judgment.⁷ The omission of the words in an indictment, "in the name and by the authority of the people of the state of Illinois," may be taken advantage of by motion in arrest of judgment or on error.⁸

¹ *State v. Fort*, 1 Car. Law R., 510; *Johnson v. People*, 22 Ills., 317; *Douglass v. State*, 3 Wis., 820; *Powell v. U. S.*, 1 Morris Iowa, 17; *Sartorius v. State*, 24 Missis., 602; *State v. Hardie*, 3 Murphy, 232; *Aylesworth v. People*, 65 Ills., 301.

² *Gardiner v. People*, 20 Ills., 430; *Kelley v. People*, 39 Ills., 157; *Sattler v. People*, 59 Ills., 68; *Gahn v. People*, 58 Ills., 160.

³ *Whitehurst v. Davis*, 2 Hayw., 113; *State v. Fort*, 1 Car. Law R., 510; *Com. v. Chancey*, 2 Ashm., 91; *Com. v. Beckley*, 2 Met., 330; *Com. v. Call*, 21 Pick., 509; *Com. v. Tuck*, 20 Pick., 356; *Dyer v. Com.*, 23 Pick., 402.

⁴ R. S., 408, § 411; *Guykowski v. People*, 1 Scam., 476; *People v. Wallace*, 9 Cal., 30; *People v. Cox*, 9 Cal., 32; *State v. Holmes*, 28 Conn., 230.

⁵ *Winship v. People*, 51 Ills., 296; *Jones v. People*, 53 Ills., 366; *State v. Millican*, 15 Lou. An., 557; *State v. Bondreaux*, 14 La., 88; *Wise v. State*, 24 Ga., 31; *Com. v. Frey*, 14 Wright Pa., 245.

⁶ *Com. v. Northampton*, 2 Mass., 116.

⁷ 1 Arch. C. P. & Pl., 671; *People v. Taylor*, 3 Denio, 98; *State v. Cars*, 34 N. H., 510; *State v. Barrett*, 42 N. H., 466; *State v. Nicholson*, 14 La., 785; *Lutz v. Com.*, 5 Casey, 441, 444; *Walston v. Com.*, 16 B. Monr., 15; *Dillon v. State*, 9 Ind., 408; *Hare v. State*, 4 Ind., 241.

⁸ *Donnelly v. People*, 11 Ills., 552; *Wright v. People*, 15 Ills., 417; *Hay v. People*, 59 Ills., 94; *People v. Mississippi and Atlantic R. R. Co.*, 13 Ills., 66.

§ 1000. **What not a Sufficient Cause for the Arrest of Judgment.** — Objections to the mode of summoning a grand or petit jury should be taken by a challenge of the array, or by a motion to quash the indictment founded upon the affidavit of some irregularity, and cannot be taken on a motion for a new trial or in arrest of judgment.¹ It is not a sufficient cause for the arrest of judgment, that the name of the defendant is incorrectly stated in the indictment;² or that the indictment concludes erroneously;³ or that the name of the prosecutor is not indorsed upon an indictment for false imprisonment⁴ or malicious mischief;⁵ or that the indictment is bad for duplicity⁶ or the misjoinder of counts,⁷ except where offenses requiring different punishments are charged in the same count;⁸ or that the word "and" is omitted, where necessary to connect dependent members of the same sentence in the indictment;⁹ or that the defendants were convicted of different degrees of homicide;¹⁰ or that it appears from the record that there was at the time of the trial another indictment against the defendant for the same offense pending in the same court;¹¹ or that the jury when out were in charge of an unsworn officer.¹² A motion in arrest of judgment can be sustained only by matter apparent on the record,¹³ and cannot be supported by

¹ *Rex v. Sheppard*, 1 Leach, 4th Ed., 101; *Hurley v. State*, 6 Ohio, 399; *Stone v. People*, 2 Scam., 326; *Williams v. People*, 54 Ills., 424; *Com. v. Chauncy*, 2 Ashm., 70; *contra*, *State v. Leozier*, 2 Speers, 211.

² *State v. Thompson*, Cheves, 31; *Scull v. Bridle*, 2 Wash. C. C., 200; *Com. v. Beckley*, 3 Met., 330; *McDonald v. People*, 47 Ills., 533.

³ *Camp v. State*, 25 Ga., 689.

⁴ *Winship v. People*, 51 Ills., 296.

⁵ *Vezain v. People*, 40 Ills., 397.

⁶ *Com. v. Tucker*, 29 Pick., 356; *State v. Johnson*, 3 Hill S. C., 1.

⁷ *Com. v. Gillespie*, 7 Serg. & R., 476; *Rex v. Ferguson*, 29 Eng. L. & Eq., 526.

⁸ *Reed v. People*, 1 Park. Cr. R., 481; *People v. Wright*, 9 Wen., 196; *State v. Merrill*, 44 N. H., 24; *State v. How*, 1 Rich., 260; *Com. v. Symonds*, 2 Mass., 163.

⁹ *Lutz v. Com.*, 29 Penn. S., 441.

¹⁰ *Mash v. State*, 32 Missis., 406.

¹¹ *Com. v. Murphy*, 4 Cush., 472.

¹² *McCann v. State*, 9 Sm. & M., 465; *McIntyre v. People*, 38 Ills., 514.

¹³ *Jones v. People*, 53 Ills., 366; *State v. Allen*, R. M. Charlt., 518.

matter which becomes a part of the record after the motion is overruled.¹

§ 1001. **After Arrest of Judgment the Defendant may be Retried.**—Where a prisoner has been indicted and found guilty by the verdict of a jury if the judgment is arrested, even for an insufficient cause, and the defendant discharged, he has not been legally in jeopardy and cannot plead the conviction in bar to a subsequent indictment.² If the judgment is arrested on motion of the defendant for a cause which may be obviated on another trial, he is not entitled to be discharged, but may be tried again upon the same indictment,³ or he may be held until a new indictment may be found against him on which he may be tried.⁴

§ 1002. **Motions for a New Trial and in Arrest of Judgment Disposed of by Rendering Final Judgment.**—It is not necessary that a motion for a new trial⁵ or in arrest of judgment should be formally disposed of before entering final judgment. The entering of the judgment is in effect an overruling of these motions.⁶

¹ *Howard v. State*, 13 Sm. & M., 261; *State v. Chitty*, 1 Bailey, 379.

² *Gerard v. People*, 3 Scam., 363; *State v. Thomas*, 8 Rich., 295.

³ *People v. McKay*, 8 Johns, 218.

⁴ *State v. Holley*, 1 Brev., 35.

⁵ *Hall v. Nees*, 27 Ills., 413.

⁶ *McIntyre v. People*, 38 Ills., 521; *Weaver v. Com.*, 20 Penn. S., 455.

SECTION IX.

SENTENCE, JUDGMENT, RECORD AND EXECUTION.

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1. SENTENCE AND JUDGMENT.

§ 1003. Term of Imprisonment or Amount of the Fine, when Fixed by the Court.—The statute provides that “when the accused pleads guilty, and in all other cases not otherwise pro-

vided for, the court shall fix the time of confinement, or the amount of the fine, or both, as the case may require.”¹

§ 1004. **Workhouse.**—“Any person convicted, in a court of this state having jurisdiction, of any crime or misdemeanor, the punishment of which is confinement in the county jail, may be sentenced by the court in which the conviction is had, to labor for the benefit of the county, during the term of such imprisonment, in the workhouse, house of correction or other place provided for that purpose by the county or city authorities. Nothing contained in this act shall be construed to prevent the imprisonment of any convict in the reform school at Pontiac, as provided by law.”²

§ 1005. **Punishment of Offenders under Eighteen.**—“Persons under the age of eighteen years shall not be punished by imprisonment in the penitentiary for any offense except murder, manslaughter, rape, robbery, burglary or arson; in all other cases where a penitentiary punishment is or shall be provided, such person under the age of eighteen years and over the age of sixteen years shall be punished by confinement in the county jail for a term not exceeding eighteen months, at the discretion of the court.”³

§ 1006. **Convicts under Control of County Board.**—“Nothing contained in this act shall prevent the county board taking such control of convicts committed to the county jail, and their transfer to workhouses, houses of correction or other places of employment, as is provided by law; *Provided*, that no such transfer shall be made of any convict without the order of the court in which he was convicted, if in session, or of the judge thereof in vacation, and in all cases a report of such transfer shall be made to the court, as soon as may be after the transfer, and entered of record.”⁴

§ 1007. **Who may be Sent to Reform School.**—“Whenever any boy between the ages of ten and sixteen is convicted, before

¹ R. S., 413, § 447; *Armstrong v. People*, 37 Ills., 460.

² R. S., 413, § 448.

³ *Id.*, § 449.

⁴ *Id.*, § 450.

any court of competent jurisdiction, of any crime which, if committed by an adult, would be punishable by imprisonment in the county jail or penitentiary, such juvenile offender shall be committed by order of such court to said state reform school for a term not less than one year, nor more than five years: *Provided*, that when the crime is punishable by imprisonment in the county jail the court may, in the exercise of its discretion, commit such offender to the county jail for the term authorized by law for the punishment of the offense of which the offender is convicted; *and, provided, further*, that nothing in this act shall be construed to debar any court from punishing for any capital offense in such manner as is or may be provided by law.”¹

§ 1008. A Sentence to Imprisonment in the Bridewell of the city of Chicago is legal.²

§ 1009. Sentence of Several Persons Jointly Convicted.—Where several persons are jointly indicted and convicted they should be sentenced severally, and the imposition of a joint fine is erroneous.³

§ 1010. Judgment for Costs.—The statute provides that “when any person is convicted of an offense under any statute, or at common law, the court shall give judgment that the offender pay the costs of the prosecution.”⁴

§ 1011. Costs where Several Defendants.—Where several persons are jointly indicted, they are severally liable for all the costs made by the people in procuring their several convictions; but not for the costs of each other, or for the separate costs made by the people against their co-defendants.⁵

§ 1012. Costs where the Defendant is Successful.—Where the defendant is successful he pays his own costs only;⁶ but is not entitled to a judgment against the people for them. Such de-

¹ R. S., 850, § 12.

² Perry v. People, 14 Ills., 496; Bowers v. People, 17 Ills., 375.

³ Moody v. People, 20 Ills., 319; State v. Gay, 10 Mo., 440.

⁴ R. S., 413, § 451.

⁵ Moody v. People, 20 Ills., 319.

⁶ State v. Whitehead, 3 Murphy, 223; State v. Hargate, C. & N., 63.

fendant is liable to pay his own costs to the proper officer where the costs accrue in the Supreme Court.¹

§ 1013. **Commitment to Enforce the Payment of Costs and Fines.** — “When a fine is inflicted, the court may order, as a part of the judgment, that the offender be committed to jail, there to remain until the fine and costs are fully paid or he is discharged according to law.”²

2. THE RECORD.

§ 1014. **Defects in the Record for which Judgment will be Reversed.** — In criminal cases the judgment will be reversed where the record certified to the Supreme Court fails to show the time and place of holding the court in a proper caption;³ that the grand jurors were called, impaneled and sworn;⁴ or that the indictment upon which the conviction was had was ever presented by the grand jurors in open court;⁵ or in cases of treason or a felony that the prisoner was furnished with a copy of the indictment and a list of the witnesses, and required to plead before he was placed on trial;⁶ or that the defendant had been arraigned upon the indictment;⁷ or that the defendant had plead to the indictment before trial;⁸ or that the petit jury

¹ *Carpenter v. People*, 3 Gilm., 147.

² R. S., 413, § 452; *Metzker v. People*, 14 Ills., 101.

³ *McKinney v. People*, 2 Gilm., 540.

⁴ *Williams v. People*, 54 Ills., 424; *Sawyer v. State*, 17 Ind., 435; *Foster v. State*, 31 Missis., 421; *Cody v. State*, 3 How. Missis., 27; *State v. Schoenwald*, 31 Mo., 147.

⁵ *Nomaque v. People*, Breese, 110, 2d Ed., 145; *Gardiner v. People*, 3 Scam., 84; *McKinney v. People*, 2 Gilm., 540; *Ramey v. People*, 3 Gilm., 71; *Kelley v. People*, 39 Ills., 157; *Gardiner v. People*, 20 Ills., 430; *Yundt v. People*, 65 Ills., 374; *Brown v. State*, 7 Humph., 155; *State v. Muzingo*, Meigs, 112, 113; *Chappel v. State*, 8 Yerg., 166; *Greene v. State*, 19 Ark., 178; *Jenkins v. State*, 30 Missis., 480; *Adams v. State*, 11 Ind., 304; *Com. v. Cawood*, 2 Va. Cas., 527; *Hite v. State*, 9 Yerg., 198.

⁶ *McKinney v. People*, 2 Gilm., 540; *Yundt v. People*, 65 Ills., 374.

⁷ *McKinney v. People*, 2 Gilm., 551; *Aylesworth v. People*, 65 Ills., 301.

⁸ *Johnson v. People*, 22 Ills., 317; *Yundt v. People*, 65 Ills., 374; *McKinney v. People*, 2 Gilm., 551; *Aylesworth v. People*, 65 Ills., 301.

were impaneled and sworn;¹ or that the place where the offense was committed was within the county and jurisdiction of the court;² or that there was a verdict and judgment.³ Where the original record in the circuit court, as shown by the transcript, contains no *placita* or convening order of the court, such defect is a ground for a reversal of the judgment.⁴ Such a record cannot be aided by a bill of exceptions.⁵

§1015. **When Judgment will not be Reversed for Omissions in the Record—Bill of Exceptions.**—The judgment will not be reversed for the reason that the record does not show affirmatively that the grand or petit jury were summoned or impaneled in accordance with the statute;⁶ or that the record does not show that the requisite number of grand jurors was present at the time of the organization of the body;⁷ or that the record does not contain the names of the grand jurors⁸ or petit jurors;⁹ or that the record does not contain the form of the oath administered to the grand jurors, if it appears that they were sworn;¹⁰ or that the record does not show that the name of the foreman of the grand jury was indorsed upon the back of the indictment;¹¹ or that the record does not show that the names of the witnesses on whose evidence the indictment was found were indorsed upon the back of the indictment;¹² or in case of an

¹ 1 Bish. C. P. & Pl., 1182; *Nels v. State*, 2 Texas, 280; *Boose v. State*, 10 Ohio S., 575; *McKinney v. People*, 2 Gilm., 551.

² 1 Bish. Cr. P., § 364; *People v. Miller*, 14 John., 371.

³ *McKinney v. People*, 2 Gilm., 540.

⁴ *P. M. L. Co. v. City of Chicago*, 56 Ills., 304; *Rich v. City of Chicago*, 59 Ills., 287; *Lawrence v. Fast*, 20 Ills., 338; *Dukes v. Rowley*, 24 Ills., 210; *Truett v. Griffin*, 61 Ills., 26.

⁵ *P. M. L. Co. v. City of Chicago*, 56 Ills., 304.

⁶ *Stone v. People*, 2 Scam., 326; *Schirmer v. People*, 32 Ills., 276.

⁷ *Williams v. People*, 54 Ills., 424.

⁸ *Id.*

⁹ *Turns v. Com.*, 6 Met., 224.

¹⁰ *Bell v. State*, 5 Engl., 536; *Wrockledge v. State*, 1 Iowa, 167; *Bivens v. State*, 6 Engl., 455; *Arthur v. State*, 3 Texas, 403; *Drake v. Brander*, 8 Texas, 351; *Pierce v. State*, 12 Texas, 210; *Russel v. State*, 10 Texas, 288; *State v. Schoenwald*, 31 Mo., 147.

¹¹ *Gardiner v. People*, 3 Scam., 83.

¹² *McKinney v. People*, 2 Gilm., 551; *Gardiner v. People*, 3 Scam., 85.

indictment for malicious mischief or false imprisonment that it does not appear from the record that the name of the prosecutor was indorsed on the indictment;¹ or that it does not appear from the record what disposition was made of the jury at the adjournment of the court; or that the jury was placed in charge of a sworn officer at the time they retired to deliberate of their verdict as required by the statute;² for these objections must be taken at the proper time by the proper motion, and the question saved by a bill of exceptions in which case they may be made available upon error.³

§ 1016. **Record of the Presence of the Prisoner.** — Where the personal presence of the defendant is necessary in point of law the record must show the fact.⁴ Yet this need not be by express averment; for if the fact of the presence results necessarily from other matters stated,⁵ or if the presence is once stated, and it clearly appears from the whole record to have been continuous, this will be sufficient.⁶ Therefore where a record in a criminal case shows the arraignment of the prisoner, his personal presence is also thereby shown, for his arraignment involves his personal appearance. In such case if no interval appears by the record between the arraignment of the prisoner, the trial, verdict and judgment, the presumption is that he remained in court during the whole time, including the moment when sentence was passed by the court.⁷ It has been held in a case of felony, that the record must show that

¹ *Vezain v. People*, 40 Ills., 397; *Winship v. People*, 51 Ills., 297.

² *McKinney v. People*, 3 Gilm., 540; *Morton v. People*, 47 Ills., 476.

³ *Stone v. People*, 2 Scam., 326; *McKinney v. People*, 2 Gilm., 551; *Nomaque v. People*, Breese, 110, 2d Ed., 145; *Gardiner v. People*, 3 Scam., 83.

⁴ 1 Bish. Cr. P., § 1180; *Scaggs v. State*, 8 Sm. & M., 722; *Sperry v. Com.*, 9 Leigh, 623; *Sailor v. State*, 1 Harring., 357; *Dunn v. Com.*, 6 Barr., 384; *Dyson v. State*, 26 Missis., 362; *State v. Mathews*, 20 Mo., 55; *State v. Cross*, 27 Mo., 332; *Hooker v. Com.*, 13 Grat., 763, 766; *Safford v. People*, 1 Park. Cr. R., 476.

⁵ *Stephens v. People*, 4 Park. Cr. R., 396; *State v. Langford*, Busbee, 436; *Sweeden v. State*, 19 Ark., 205; *State v. Craton*, 6 Ired., 164.

⁶ *Rhodes v. State*, 23 Ind., 24; *Jeffries v. Com.*, 12 Allen, 145; *State v. Wood*, 17 Iowa, 18; *Stephens v. People*, 19 N. Y., 549, 4 Park. Cr. R., 396.

⁷ *Schirmer v. People*, 33 Ills., 276.

the court demanded of the defendant what he had to say why judgment should not be pronounced against him,¹ but the better opinion is that this is not necessary in this state.²

§ 1017. **Record, how Made — Transcript.** — The statute provides that clerks of courts “shall enter all judgments, decrees and orders of their respective courts before the final adjournment of the respective terms thereof, or as soon thereafter as practicable.”³ In a criminal case the clerk is not required to make a complete record. It is his duty to take daily minutes of the proceedings, and as soon as practicable, to enter them in the proper form in the order book, which, with the files, make the record of the cause. From these he makes out his transcript for the supreme court.⁴

§ 1018. **What a Part of the Record.** — The indictment, pleadings, orders of court and judgment, are a part of the record and should be inserted in it, and should not be inserted in the bill of exceptions.⁵ A bill of exceptions when properly settled, signed and sealed by the judge, and filed, becomes a part of the record.⁶ A bill of particulars⁷ or an affidavit⁸ is not a part of the record unless brought into it by a bill of exceptions. The minutes of the judge on his docket are no part of the record.⁹

§ 1019. **In Cases not Capital, the Time when the Sheriff shall Execute the Sentence** of the court, forms no part of the judgment and sentence, and need not be entered of record.¹⁰

¹ *Safford v. People*, 1 Park. Cr. R., 476.

² *Schirmer v. People*, 33 Ills., 279; *McKinney v. People*, 2 Gilm., 540.

³ R. S., 261, § 14.

⁴ *Schirmer v. People*, 33 Ills., 282; *Tildon v. Johnson*, 6 Cush., 354; *Balch v. Shaw*, 7 Cush., 282; *Tray v. Wenzel*, 8 Cush., 315.

⁵ *Safford v. Vail*, 22 Ills., 327; *Whiting v. Fuller*, 22 Ills., 33.

⁶ *Holmes v. Parker*, 1 Seam., 567.

⁷ *Eggleston v. Buck*, 24 Ills., 262; *Scofield v. Settle*, 31 Ills., 516.

⁸ *Vandruuff v. Craig*, 14 Ills., 394.

⁹ *McCormick v. Wheeler*, 36 Ills., 115; *Sattler v. People*, 59 Ills., 68.

¹⁰ *Morton v. People*, 47 Ills., 468.

FORM OF TRANSCRIPT OF RECORD.¹

Randolph County Circuit Court, }
 September Term, A. D. 1863. }

At a Circuit Court begun and held at the court-house in the city of Chester, in and for the county of Randolph, state of Illinois, on Monday, the fourteenth day of September, in the year of our Lord one thousand eight hundred and sixty-three. Present (*the judge and other officers of the court*).

John Campbell, sheriff of said county, returned into court the names of the following persons selected by the *county board* of the said county to serve as a grand jury at this term of said court, *to wit. (insert their names)*.

And upon the calling of the said grand jury, each of said persons respectively answered to their names, whereupon the court appointed said Jonathan Chestnutwood foreman, and the said jury was duly impaneled and sworn as a grand inquest for the people of the state of Illinois to inquire for the body of the county, etc., and after receiving their charge from the court retired to their room to consider of their presentments, Edward Bur-chire being sworn as attending officer.

Randolph County Circuit Court, September, A. D. 1863.

September Term, 1863, of the Randolph Circuit Court. The grand jury is organized this 14th day of September, 1863, by appointing J. Chestnutwood, foreman of the grand jury.

The grand jury for their first report into open court this 15th day of September, report as true bills of indictment, the following bills into open court, in words and figures following:

The People *v.* William Schirmer, indicted for murder (*here insert copy of the indictment indorsed thus*):

The People.

v.

William Schirmer.

A True Bill.

J. CHESTNUTWOOD, Foreman.

Witnesses, etc. (*naming them.*)

Filed Sept. 15, 1863.

S. ST. VRAIN, Clerk.

The following is the order of the court:

Randolph County Circuit Court.

September Term, A. D. 1863.

Sept. 17, 1863.

The People of the State of Illinois }
vs. }
 William Schirmer. }

Indictment for Murder.

And now on this day comes the people by Watts O. Melveny Johnson and J. B. Underwood, and the defendant by Snyder & Barnum, and the de-

¹ This form was held sufficient. Schirmer *v.* People, 33 Ills., 277.

fendant having been furnished with a copy of the indictment and a list of the regular panel of the jurors, etc., the defendant is arraigned and enters the plea of not guilty; whereupon the trial commences and the regular panel of the jury being exhausted, the sheriff of said county is ordered to summons from the by-standers six jurors, etc., which is done, and the names of the so summoned jurors given to the defendant's attorney, whereupon came the jurors of the jury selected in this cause, *to wit.* (*insert the names of the jurors*) twelve good and lawful men, who being elected, tried and duly sworn a true verdict to render in said cause, etc. And the said jury after hearing the evidence and arguments of counsel in said cause, and after retiring to consider of their verdict, returned into court the following verdict, September 18th, 1863, "We the jury find the defendant guilty of manslaughter, and fix the term of his confinement in the penitentiary for and during his natural life. Whereupon the court, being fully advised of and concerning said case, verdict, evidence, etc., doth order and adjudge that said William Schirmer be sentenced to the penitentiary of the state of Illinois for the space and term of his natural life at hard labor, except one day of the time, which is to be solitary confinement in said penitentiary; and that the sheriff of Randolph county see that this order be executed, etc., and that said people have their costs, etc.

FORM OF CERTIFICATE TO BE ATTACHED.

State of Illinois, }
 Randolph County, } ss.

I, S. St. Vrain, clerk of the circuit court, within and for the county and state aforesaid, do hereby certify the foregoing to be a full, true and complete copy of the proceedings in the circuit court, in the case of the People of the State of Illinois *v.* William Schirmer, as appears of record, and on the files in my office.

In testimony whereof I have hereunto subscribed my
 hand and affixed the official seal of my office at
 the city of Chester, Illinois, this 18th day of No-
 vember, A. D. 1863.

{ Seal of Circuit }
 { Court attached. }

S. ST. VRAIN, Clerk.

§ 1020. **Record and Transcript, how Amended.**—If a party desires the amendment or correction of a record after the term at which the cause was tried he may on proper notice apply therefor in open court and have the amendment appear from an order of court entered in term time, but the record cannot be amended except by an order of the court made in term time.¹ During the term at which a cause is tried the record

¹ 1 Bish. Cr. P., § 1160; Wallahan *v.* People, 40 Ills., 103; Goodrich *v.* City of Minock, 62 Ills., 122; Newman *v.* Ravencroft, 67 Ills., 496.

may be corrected or amended so as to correspond with the facts by the clerk,¹ or by the direction of the court.² And the court may during the term modify or expunge its orders, judgments and the like.³ Where the alterations in a transcript are noted in the margin thereof and apparently in a different handwriting and in different ink, in the absence of some explanation or statement of the clerk that he made such alterations, the Supreme Court will not recognize them. Where such changes are found on the transcript, to secure their recognition there must be evidence that they were properly made.⁴

3. EXECUTION OF JUDGMENT.

§ 1021. **Death Penalty—Manner of Inflicting.**—The statute provides that “the manner of inflicting the punishment of death shall be by hanging the person convicted by the neck until dead, at such time as the court shall direct, not less than fifteen nor more than twenty-five days from the time sentence is pronounced: *Provided*, the day set shall not occur before the tenth day of the term of the Supreme Court occurring (in either of the grand divisions) next after the pronouncing of the judgment; *and, provided*, that for good cause the court or governor may prolong the time. At the expiration of the time so prolonged, the judgment shall be executed the same as if that were the time fixed by the judgment for the execution thereof.”⁵

§ 1022. **Place of Inflicting.**—“Whenever any person shall be condemned to suffer death by hanging for any crime of which such person shall have been convicted in any court of this

¹ *Schirmer v. People*, 33 Ills., 282.

² *Read v. Sutton*, 2 Cush., 115; *Weighorst v. State*, 7 Md., 442; *Gibson v. Com.*, 2 Va. Cas., 111; *Com. v. Quann*, 2 Va. Cas., 89; *Franklin v. State*, 28 Ala., 9; *Mayo v. Jones*, N. C., 231; *Leslie v. Fischer*, 62 Ills., 118.

³ *Com. v. Goddard*, 14 Mass., 455, 458; *Com. v. Weymouth*, 2 Allen, 144; *State v. Nutting*, 39 Me., 359.

⁴ *Scott v. People*, 63 Ills., 509.

⁵ R. S., 412, § 439.

state, such punishment shall be inflicted within the walls of the prison of the county in which such conviction shall have taken place, or within a yard or inclosure adjoining such prison.”¹

§ 1023. **Where Prisoner to Remain before Execution.**—It is not erroneous after a change of venue upon conviction for murder to order that the prisoner remain in the jail of the county where he is convicted and where the sentence of death, which is the punishment, is to be imposed.²

§ 1024. **Duty of Sheriff at Execution.** — “It shall be the duty of the sheriff, or the deputy sheriff of the county, to be present at such execution, and by at least three days’ previous notice, to invite the presence of the judges, prosecuting attorney, and clerks of the courts of the said county, together with two physicians and twelve reputable citizens, to be selected by said sheriff or his deputy. And the said sheriff or deputy shall at the request of the criminal permit such ministers of the gospel, not exceeding three, as said criminal shall name, and any of the immediate relatives of said criminal, to be present at said execution, and also such officers of the prison, deputies and constables as shall by him be deemed expedient to have present; but no other persons than those herein mentioned shall be permitted to be present at such execution, nor shall any person, not a relative of the criminal, under the age of twenty-one years, be allowed to witness the same.”³

§ 1025. **Certificate of Execution.** — “The sheriff or his deputy, or the judges attending such execution, shall prepare and sign officially a certificate, setting forth the time and place thereof, and that such criminal was then and there executed, in conformity to the sentence of the court and the provisions of this act; and shall procure to said certificate the signatures of the other public officers and persons, not relatives of the criminal, who witnessed such execution, which certificate

¹ R. S., 412, § 440.

² Jackson v. People, 18 Ills., 269

³ R. S., 412, § 441.

shall be filed with the clerk of the court where the conviction of such criminal was had.”¹

§1026. **Disposition of Body.** — “The court may order, on the application of any respectable surgeon or surgeons, that the body of the convict shall, after death, be delivered to such surgeon or surgeons for dissection, unless the same be objected to by some relative of the convict.”²

§ 1027. **Judgment a Lien on Property Real and Personal.**— “The property, real and personal, of every person who shall be convicted of any offense, shall be bound, and a lien is hereby created on the property, both real and personal, of every such offender, not exempt from execution or attachment, from the time of finding the indictment, at least so far as will be sufficient to pay the fine and costs of prosecution. The clerk of the court in which the conviction is had shall, at the end of the term, issue an execution for every fine that shall have been imposed during the term, and remains unpaid, and all costs of conviction remaining unpaid; in which execution shall be stated the day on which the arrest was made, or indictment found, as the case may be. The execution may be directed to the proper officer of any county in this state. The officer to whom such execution is delivered shall levy the same upon all the estate, real and personal, of the defendant (not exempt from execution), possessed by him on the day of the arrest or finding of the indictment, as stated in the execution, and any such property subsequently acquired; and the property so levied upon shall be advertised and sold in the same manner as in civil cases, with the like rights to all parties that may be interested therein. It shall be no objection to the selling of any property under such execution that the body of the defendant is in custody for the fine or costs or both.”³

§ 1028. **Acknowledgment of Judgment.**—“If the person convicted, together with one or more sufficient sureties, will ac-

¹ R. S., 412, § 442.

² Id., 443.

³ Id., 413, § 453

knowledge a judgment in favor of the people of the state of Illinois for the amount of the fine and costs, or the costs only, when no fine is imposed, the court shall cause the same to be entered in full satisfaction of the fine and costs, or costs only, with a direction that if the judgment is not paid within five months from the time of entering the same, execution shall be issued thereon, and the defendant shall, upon the entering of such judgment, be discharged from imprisonment on account of such fine or costs, but he shall not thereby be discharged from any imprisonment, which is made a part of his punishment, not dependent upon the payment of the fine or costs. Such judgment shall be a lien upon all the real estate of the persons acknowledging the same, from the date of its entry. If the judgment so entered is not paid within five months from the entry, it may be enforced by execution, in the same manner as other judgments at law. Such judgment may be acknowledged in vacation before the clerk of the court, and he may in such case approve of the surety; and a judgment so acknowledged shall have the same force and effect from the date of the entry as if entered in term time in open court.”¹

§ 1029. *Discharge of Pauper.*—“Whenever it shall be made satisfactorily to appear to the court, after all legal means have been exhausted, that any person who is confined in jail for any fine or costs of prosecution, for any criminal offense, hath no estate wherewith to pay such fine and costs, or costs only, it shall be the duty of said court to discharge such person from further imprisonment for such fine and costs, which discharge shall operate as a complete release of such fine and costs: *Provided*, that nothing herein shall authorize any person to be discharged from imprisonment before the expiration of the time for which he may be sentenced to be imprisoned, as a part of his punishment.”²

§ 1030. *Convict Conveyed to the Penitentiary.*—“When a convict shall be sentenced to imprisonment in the penitentiary,

¹ R. S., 414, § 454.

² *Id.*, § 455.

the clerk of the court shall forthwith deliver a certified copy of the judgment to the sheriff or other proper officer of the county, who shall without delay convey the convict to the penitentiary of the state, and deliver him to the warden thereof.”¹

§ 1031. Powers of Sheriff while Conveying Convict. — “The sheriff, while conveying the convict to the penitentiary, shall have the same power to require the aid of any citizen of this state in securing such convict, or retaking him if he shall escape, as he would have in his own county, and any person who shall refuse or neglect to assist such sheriff when required, shall be liable to the same penalty as in other case of neglect or refusal to join a *posse comitatus* when lawfully required.”²

¹ R. S., 414, § 456.

² Id., § 457.

SECTION X.

WRITS OF ERROR.

- § 1032. Provisions of the Statute as to Exceptions.
 1033. Bill of Exceptions, when Necessary.
 1034. Requisites of a Bill of Exceptions.
 1035. Preparing, Settling and Filing the Bill of Exceptions.
 1036. Amendment of a Bill of Exceptions.
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 1041. Issued, how.
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 1044. Recognizance Taken by Sheriff or Warden—How Returnable.
 1045. When Judgment Affirmed—Proceedings Thereon.
 1046. Surrender of Prisoner on Affirmance of the Judgment.
 1047. Time of Service.
 1048. Returning Prisoner for Trial.

1. THE BILL OF EXCEPTIONS.

§ 1032. Provisions of the Statute. — The statute provides that “exceptions may be taken in criminal cases and bills of exceptions shall be signed and sealed by the judge, and entered of record, and error may be assigned thereon by the defendant the same as in civil cases: *Provided*, that in no criminal case shall the people be allowed an appeal, writ of error or new trial.”¹

§ 1033. Bill of Exceptions, when Necessary. — The office of a bill of exceptions is to introduce matter into the record which otherwise would not be a part of it, but where the record shows upon its face all of the necessary proceedings and

¹ R. S., 411, § 437. No appeal is allowed in a criminal case. *Mohler v. People*, 24 Ill., 27.

decisions, a bill of exceptions is unnecessary.¹ If, however, the matter does not properly belong to the record, the court and not the clerk must certify an exception to bring it before the appellate court.² Therefore, if the clerk certifies an exception to the overruling of a motion for a new trial,³ or copies an affidavit,⁴ stipulation⁵ or deposition,⁶ a note read on the trial, or any other evidence⁷ into the transcript not contained in a bill of exceptions, or makes any entry in the record which does not properly belong there,⁸ it does not thereby become a part of the record, and cannot be considered by the appellate court. An exception taken to overruling a demurrer is improper, for without a bill of exceptions the point saves itself, being a part of the record by the demurrer.⁹ Neither is it necessary to except to the decision of the court in overruling a motion in arrest of judgment, for such motion is a part of the record and saves itself without the necessity of a bill of exceptions.¹⁰

¹ *Chicago M. & St. Paul R. R. Co. v. Melville*, 66 Ills., 329; *Waterman v. Caton*, 55 Ills., 94; *Randolph v. Emerick*, 13 Ills., 344; *Nichols v. People*, 40 Ills., 395; *Van Dusen v. Pomeroy*, 24 Ills., 289; *Gallimore v. Dazy*, 12 Ills., 143; *Lowe v. Moss*, 12 Ills., 478; *Joliet & N. R. R. Co. v. Jones*, 20 Ills., 225; *McKindley v. Buck*, 43 Ills., 490; *Swift v. Castle*, 23 Ills., 209; *Kitchell v. Burgwin*, 21 Ills., 40.

² *Boyle v. Levings*, 28 Ills., 316; *Hay v. Hays*, 56 Ills., 342; *Drew v. Beal*, 62 Ills., 164.

³ *Boyle v. Levings*, 28 Ills., 316; *Lucas v. Farrington*, 21 Ills., 32; *Gill v. People*, 42 Ills., 322.

⁴ *Magher v. Howe*, 12 Ills., 379; *Cummings v. McKinney*, 4 Scam., 58; *Saunders v. McCollins*, 4 Scam., 419; *Mann v. Russell*, 11 Ills., 586; *Miller v. Metzger*, 16 Ills., 39; *Lucas v. Farrington*, 21 Ills., 31; *Schlump v. Reidersdorf*, 28 Ills., 68; *Swain v. Cawood*, 2 Scam., 506; *Horn v. Neu*, 63 Ills., 539; *Van Pelt v. Dunford*, 58 Ills., 145; *McDonald v. Arnont*, 14 Ills., 58; *Vandruf v. Craig*, 14 Ills., 395; *Corey v. Russell*, 3 Gilm., 366; *Edwards v. Patterson*, 5 Gilm., 126; *Petty v. Scott*, 5 Gilm., 209; *Holmes v. People*, 5 Gilm., 478.

⁵ *Wilson v. McDowell*, 65 Ills., 522.

⁶ *Moss v. Flint*, 13 Ills., 572.

⁷ *Newman v. Ravenscroft*, 67 Ills., 496.

⁸ *Gill v. People*, 42 Ills., 322.

⁹ *Hawk v. McCullough*, 21 Ills., 223; *Hamlin v. Reynolds*, 22 Ills., 207; *Hough v. Baldwin*, 16 Ills., 293.

¹⁰ *Mix v. Nettleton*, 29 Ills., 245; *Nichols v. People*, 40 Ills., 395.

But in the case of all other motions,¹—including motions for a new trial,² for a change of venue,³ or to discharge the prisoner from arrest,⁴ or to quash the indictment, for the reason that the name of the foreman of the grand jury,⁵ or that the name of the prosecutor,⁶ or that the names of the witnesses,⁷ is or are not indorsed upon it,—the only way in which the circuit court can state the facts connected with them, and its action in overruling such motions in order to be reviewed in the Supreme Court, is to preserve the motions and the action of the court thereon in a bill of exceptions.⁸ It must appear by the bill of exceptions, not only that the motion was made, but also that when it was overruled the defendant then and there excepted, or the action of the circuit court will not be reviewed by the Supreme Court.⁹ Where the defendant moved for a new trial, for the reason that the verdict was insufficient, which motion was overruled by the circuit court, but the defendant did not except, the Supreme Court on error held that the defendant should have moved to have set aside the verdict, and upon the overruling of the motion taken an exception to the ruling and preserved the motion and exception by a bill of exceptions, but that not having done so he must be considered as acquiescing in the ruling and judgment of the court.¹⁰ The presumption is, except in those cases where the

¹ *Troy v. Riley*, 3 Scam., 259; *Snell v. Trustees*, 58 Ills., 290.

² *Pottle v. McWhorter*, 13 Ills., 454; *Smith v. Kahill*, 17 Ills., 67; *Boyle v. Levings*, 28 Ills., 314; *Gill v. People*, 42 Ills., 321.

³ *Chicago, Milwaukee and St. Paul R. R. Co. v. Melville*, 66 Ills., 329.

⁴ *Mingia v. People*, 54 Ills., 278; *Jones v. People*, 53 Ills., 356.

⁵ *Gardiner v. People*, 3 Scam., 85.

⁶ *Vezain v. People*, 40 Ills., 397; *Winship v. People*, 51 Ills., 296.

⁷ *McKinney v. People*, 2 Gilm., 552; *Morton v. People*, 47 Ills., 468.

⁸ *Gill v. People*, 42 Ills., 321; *Lucas v. Farrington*, 21 Ills., 32; *Selby v. Hutchinson*, 4 Gilm., 336; *Gaddy v. McLeave*, 59 Ills., 182.

⁹ *Gill v. People*, 42 Ills., 322; *Pottle v. McWhorter*, 13 Ills., 454; *Drew v. Beal*, 62 Ills., 164; *Smith v. Kahill*, 17 Ills., 67; *Boyle v. Levings*, 28 Ills., 314; *Lucas v. Farrington*, 21 Ills., 32; *Dickhut v. Durrell*, 11 Ills., 83; *Gibbons v. Johnson*, 3 Scam., 63; *Miere v. Bush*, 3 Scam., 23; *Leigh v. Hodges*, 3 Scam., 17; *Jones v. People*, 53 Ills., 366; *Cummings v. McKinney*, 4 Scam., 57; *Johnson v. Gillet*, 52 Ills., 358; *Daniels v. Shields*, 38 Ills., 197.

¹⁰ *Gill v. People*, 42 Ills., 322; *Chittenden v. Evans*, 48 Ills., 52; *Schlencker v. Risley*, 3 Scam., 483.

judgment may be arrested for the defects in the record, that no errors have been committed by the circuit court, and on error the judgment will always be affirmed, unless it appears affirmatively by a bill of exceptions that the defendant has been prejudiced by some error of the court.¹ Therefore where the record shows nothing to the contrary, it will be presumed that the court hearing the trial discharged its duty by sending a sworn officer with the jury,² or that if the jury separated, that it was with the consent of the prisoner;³ the Supreme Court will not look into the copy of the instrument sued on and filed with the declaration for evidence, but only to the bill of exceptions.⁴

The objection that the verdict of guilty in a criminal case is against the evidence, cannot avail on error where the evidence is not preserved in the record by a bill of exceptions,⁵ or the bill of exceptions omits to state that it contains all of the evidence,⁶ for in such case the court will presume that there was other and sufficient evidence to support the verdict.⁷

¹ *Morton v. People*, 47 Ills., 468; *Rich v. Hathaway*, 18 Ills., 548; *Dean v. Gecman*, 44 Ills., 286; *Barger v. Hobbs*, 67 Ills., 592; *Thompson v. Schurler*, 2 Gilm., 271; *Cunningham v. Craig*, 53 Ills., 252; *Sierer v. Martin*, 63 Ills., 290; *Goodrich v. City of Minock*, 62 Ills., 125; *Kelley v. Chapman*, 13 Ills., 530; *Indianapolis & St. Louis R. R. Co. v. Miller*, 62 Ills., 468; *Tug Boat v. Waldron*, 62 Ills., 221; *Edwards v. Vandemark*, 13 Ills., 633; *Moss v. Flint*, 13 Ills., 570; *Stitt v. Brendel*, 66 Ills., 343; *Tower v. Bradley*, 66 Ills., 189; *Waterman v. Caton*, 55 Ills., 94; *Farnsworth v. Agnew*, 27 Ills., 42; *Miller v. Metzger*, 16 Ills., 390; *People v. Green*, 54 Ills., 280; *Wilson v. McDowell*, 65 Ills., 522; *Hough v. Baldwin*, 16 Ills., 293; *Wooley v. Fry*, 30 Ills., 158.

² *Morton v. People*, 47 Ills., 468; *Pate v. People*, 3 Gilm., 644; *McIntyre v. People*, 38 Ills., 514.

³ *Pate v. People*, 3 Gilm., 644.

⁴ *Newman v. Ravenscroft*, 67 Ills., 496.

⁵ *Mingia v. People*, 54 Ills., 274; *Weatherford v. Wilson*, 2 Scam., 253.

⁶ *Love v. Moynahan*, 16 Ills., 277; *Trustees v. Lefler*, 23 Ills., 90; *Rowan v. Dosh*, 4 Scam., 460; *Bates v. Buckley*, 2 Gilm., 389; *Webster v. Enfield*, 5 Gilm., 298; *Esty v. Grant*, 55 Ills., 341.

⁷ *Peoria R. R. Co. v. McIntyre*, 39 Ills., 289; *Ills. Cen. R. R. Co. v. Garnish*, 39 Ills., 370; *Ottawa Gas, etc., v. Graham*, 35 Ills., 346; *Miner v. Phillips*, 42 Ills., 123; *Gardiner v. Haynie*, 42 Ills., 291; *McPherson v. Nelson*, 44 Ills., 124; *Stickney v. Cassel*, 1 Gilm., 420; *Armstrong v. Cooley*, 5 Gilm., 512; *Warner v. Carlton*, 22 Ills., 422; *Harris v. Miner*, 28 Ills., 138; *Ballance*

Where a judgment purports to have been rendered according to a stipulation of the parties on file, unless the stipulation is embodied in a bill of exceptions it cannot be assigned for error that the stipulation did not authorize the particular judgment.¹

§ 1034. **Requisites of a Bill of Exceptions.**—If a party desires to avail himself on error of an exception to the decision of the court in sustaining or overruling a motion, he must copy into the bill of exceptions all of the affidavits, papers, stipulations, reasons for the motion, evidence, etc., relating to it, and such other matters as show the error on which he relies.² When a bill of exceptions does not purport to contain all of the evidence, the Supreme Court will not examine it to see if the evidence sustains the verdict,³ or whether the court erred in re-

v. Leonard, 37 Ills., 44; *Gallagh v. Brandt*, 52 Ills., 80; *Wheeler v. Shields*, 2 Scam., 50; *Rogers v. Hall*, 3 Scam., 6; *McLaughlin v. Walsh*, 3 Scam., 185. *McKee v. Ingalls*, 4 Scam., 32; *Bruce v. Truett*, 4 Scam., 454; *Culbertson v. Galena*, 2 Gilm., 131; *Granger v. Warrington*, 3 Gilm., 310.

¹ *Wilson v. McDowell*, 65 Ills., 522.

² *Hay v. Hays*, 56 Ills., 342; *Cromie v. Van Nortwick*, 56 Ills., 353; *Van Pelt v. Dunford*, 58 Ills., 145; *Snell v. Trustees*, 58 Ills., 290; *Gaddy v. McCleave*, 59 Ills., 182; *Horn v. Neu*, 63 Ills., 539; *Horn v. Eckert*, 63 Ills., 522; *McBain v. Enloe*, 13 Ills., 78; *Edwards v. Vandemack*, 13 Ills., 633; *Petty v. Scott*, 5 Gilm., 209; *Holmes v. People*, 5 Gilm., 478; *Wilson v. McDowell*, 65 Ills., 522; *Thompson v. White*, 64 Ills., 314; *Mann v. Russell*, 11 Ills., 586; *Wood v. Tucker*, 66 Ills., 276; *Burger v. Hobbs*, 57 Ills., 592; *Van Pelt v. Dunford*, 58 Ills., 145; *Burlingame v. Turner*, 1 Scam., 588; *Bishop Hill Colony v. Edgarton*, 26 Ills., 54; *Vallandingham v. Fellows*, 1 Scam., 233; *McLaughlin v. Walsh*, 3 Scam., 185; *Troy v. Riley*, 3 Scam., 259; *Schlump v. Reiderdorf*, 28 Ills., 68; *Murphy v. People*, 37 Ills., 447; *McKee v. Ingalls*, 4 Scam., 34; *Saunders v. McCollins*, 4 Scam., 419; *Daniels v. Shields*, 38 Ills., 197; *Gill v. People*, 42 Ills., 321; *Roberts v. Fahs*, 36 Ills., 268; *Hatch v. Potter*, 2 Gilm., 725; *Douglass v. Parker*, 43 Ills., 146; *Bulger v. Hoffman*, 45 Ills., 352; *Corey v. Russel*, 3 Gilm., 366; *McDonald v. Arnout*, 14 Ills., 58; *Vandruuff v. Craig*, 14 Ills., 395; *Hartford Ins. Co. v. Vanduzor*, 49 Ills., 489; *McClurkin v. Ewing*, 42 Ills., 283; *Moss v. Flint*, 13 Ills., 572; *Gill v. People*, 42 Ills., 322; *Smith v. Wilson*, 26 Ills., 186; but see *McKindley v. Buck*, 43 Ills., 490.

³ *Miner v. Phillips*, 42 Ills., 123; *ante* § 1033.

fusing to grant a new trial,¹ or in giving² or refusing³ instructions, or in overruling a motion to dismiss the suit,⁴ or in admitting evidence.⁵ The declaration in a bill of exceptions that "the testimony here closed" will be considered as equivalent to the assertion that all the evidence is presented.⁶ If, however, the bill of exceptions professes to give only "an outline of all the testimony in the case,"⁷ or states that "the above is nearly all of the testimony given,"⁸ or is indorsed by the attorney of the appellee with the words, "I am satisfied with the foregoing bill of exceptions," and signed by him,⁹ this is not sufficient to enable the Supreme Court to determine as to the correctness of the verdict. A bill of exceptions need not show that an instrument was formally admitted in evidence by the court and formally read to the jury, if it appears that the note was in evidence and the jury acted upon it.¹⁰ The certificate of the judge who tried the cause below, that the bill of exceptions contains all of the evidence, is conclusive, and a suggestion of counsel that the record in such case does not contain all of the evidence, will not be considered by the court.¹¹ A judgment will not be reversed merely because an instruction, though proper in itself, was refused, when it appears from the bill of exceptions that instructions were given which are not embodied in the record, for it will be presumed

¹ *Miner v. Phillips*, 42 Ills., 123; *Buckmaster v. Cool*, 12 Ills., 74; *McCormick v. Gray*, 16 Ills., 138; *McLaughlin v. Walsh*, 3 Scam., 185; but see *Lowe v. Moss*, 12 Ills., 478; *Harris v. Miner*, 28 Ills., 135; *Stickney v. Cassel*, 1 Gilm., 418.

² *Miner v. Phillips*, 42 Ills., 123.

³ *Heaton v. Kemper*, 2 Scam., 368; *Evans v. Lohr*, 2 Scam., 511; *McKee v. Ingalls*, 4 Scam., 34; *Cummings v. McKinney*, 4 Scam., 60; but see *Pittman v. Gaty*, 5 Gilm., 190.

⁴ *Buckland v. Goddard*, 36 Ills., 206.

⁵ *Ballance v. Leonard*, 37 Ills., 44; *Goodrich v. City of Minock*, 62 Ills., 124.

⁶ *Marine Bank of Chicago v. Rushmore*, 28 Ills., 463.

⁷ *Buckmaster v. Cool*, 12 Ills., 74.

⁸ *Love v. Moynahan*, 16 Ills., 278; *McPherson v. Nelson*, 44 Ills., 128.

⁹ *Ottawa Gas Light & Coke Co. v. Graham*, 35 Ills., 346.

¹⁰ *Schwarz v. Herrenkind*, 26 Ills., 208.

¹¹ *Goodwin v. Durham*, 56 Ills., 239.

that those given comprised the substance of those refused.¹ To enable the Supreme Court to pass upon the propriety of modified instructions, the instructions as asked should be inserted in the bill of exceptions and also the modifications as made by the circuit court.² Instructions given by the court to the jury can become a part of the record only by being incorporated into a bill of exceptions,³ and if not so incorporated they cannot be passed upon by the Supreme Court.⁴ So also where objection is made to the rule of the circuit court respecting the time within which instructions must be presented, under which certain instructions offered were refused, the instructions should be embodied in the bill of exceptions.⁵ Formerly it was necessary to except to the giving or refusing of an instruction at the time it was given;⁶ but the law is now changed by statute, which provides that "exceptions to the giving or refusing of any instructions may be entered at any time before the entry of final judgment in the case." If the bill of exceptions does not show that they are entered by this time the exceptions will not be considered by the Supreme Court on error.⁸ Every other exception, to be available on error, must be taken at the time the decision is made, and the bill of exceptions must show affirmatively that it was taken

¹ *Weyhrich v. Foster*, 48 Ills., 115; *Hahn v. The St. Clair Savings and Ins. Co.*, 50 Ills., 526; *Gill v. Skelton*, 54 Ills., 158.

² *Boies v. Henney*, 32 Ills., 139.

³ *Gulliver v. Adams Ex. Co.*, 38 Ills., 504; *Drew v. Beal*, 62 Ills., 164.

⁴ *Ballance v. Leonard*, 37 Ills., 44; *Drew v. Beal*, 62 Ills., 166, and authorities there cited.

⁵ *Prindeville v. People*, 42 Ills., 217.

⁶ *Hill v. Ward*, 2 Gilm., 285; *Leigh v. Hodges*, 3 Scam., 15; *Burkett v. Bond*, 12 Ills., 87; *Martin v. People*, 13 Ills., 341; *Duffield v. Cross*, 13 Ills., 699; *Charlesworth v. Williams*, 16 Ills., 338.

⁷ R. S., 781, § 54.

⁸ *Burkett v. Bond*, 12 Ills., 88; *Sullivan v. Dollins*, 13 Ills., 85; *Peck v. Boggess*, 1 Scam., 281; *Buckmaster v. Cool*, 12 Ills., 75; *Sedgwick v. Phillips*, 22 Ills., 183; *Leigh v. Hodges*, 3 Scam., 15; *Gibbons v. Johnson*, 3 Scam., 63; *Love v. Moynahan*, 16 Ills., 278; *Toledo, Peoria & W. R. Co. v. Miller*, 55 Ills., 448; *McPherson v. Hall*, 44 Ills., 265; *Ills. Cen. R. R. Co. v. Garish*, 39 Ills., 371; *Grimes v. Butts*, 65 Ills., 318; *Wight v. Wheeler*, 55 Ills., 528;

at that time.¹ Therefore if the bill of exceptions does not show that the defendant excepted to the decision of the court at the time it was made in overruling a motion for a new trial,² or for a change of venue,³ or to suppress depositions,⁴ the correctness of such decision cannot be inquired into in the Supreme Court. Where the body of a bill of exceptions shows that the exceptions were taken at the proper time, although the bill itself was not signed and sealed until some days after the trial, it is sufficient.⁵ Where an instruction appears in regular order upon the record, immediately following the instruction excepted to, the Supreme Court will presume that such exception was taken at the time the instruction was given.⁶ The arrest of counsel is not an excuse for not taking exceptions at the proper time, and if they are not so taken the Supreme Court cannot consider them on error.⁷ Where the parties agree to waive instructions in writing, and consent to an oral charge upon the whole case, the party excepting should point out specifically the portion of the charge excepted to, and the bill of exceptions must show affirmatively that he did so, or the exception will not be available on error. A general exception to the whole charge

¹ *Gilmore v. Ballard*, 1 Scam., 252; *Drew v. Beal*, 62 Ills., 164; *Swafford v. Dovenor*, 1 Scam., 165; *Dickhut v. Durrell*, 11 Ills., 72; *Daniels v. Shields*, 38 Ills., 197; *Burst v. Wayne*, 13 Ills., 664; *Sullivan v. Dollins*, 13 Ills., 85; *Boynton v. Renwick*, 46 Ills., 280; *Clemson v. Krupper*, Breese, 162, 2d Ed., 210; *Parsons v. Evans*, 17 Ills., 238; *Hance v. Miller*, 21 Ills., 639; *Johnson v. Gillett*, 52 Ills., 358; *Jones v. People*, 53 Ills., 366; *Ritchey v. West*, 23 Ills., 385; *Metcalf v. Edmiston*, 25 Ills., 392; *Armstrong v. Mock*, 17 Ills., 166; *O'Hare v. People*, 40 Ills., 533; *Gulliver v. Adams Ex. Co.*, 38 Ills., 508.

² *Dickhut v. Durrell*, 11 Ills., 72; *Miller v. Dobson*, 1 Gilm., 572; *Smith v. Kahill*, 17 Ills., 67; *Boyle v. Levings*, 28 Ills., 314; *McClurkin v. Ewing*, 42 Ills., 283; *Gill v. People*, 42 Ills., 321; *Potter v. McWhorter*, 13 Ills., 454; *Drew v. Beal*, 62 Ills., 164.

³ *Chi. & R. I. R. R. Co. v. McKean*, 40 Ills., 220; *Chicago, Milwaukee & St. Paul R. R. Co. v. Melville*, 66 Ills., 329.

⁴ *Chi. & R. I. R. R. Co. v. McKean*, 40 Ills., 220.

⁵ *Ills. Cen. R. R. Co. v. Palmer*, 24 Ills., 45; *Neece v. Halley*, 23 Ills., 416.

⁶ *Strickfadden v. Zipprick*, 49 Ills., 286.

⁷ *O'Hare v. People*, 40 Ills., 533.

will not answer.¹ The decision of the court, admitting or rejecting evidence, cannot be reviewed on error, unless the bill of exceptions shows affirmatively that the evidence was offered or objected to when offered and an exception duly taken when the decision was made.² And the evidence offered must be incorporated into the bill of exceptions, or if it consists of papers or documents, copied into it, or so referred to as to make them a part of the bill, or the Supreme Court will not take it or them into consideration.³ Where an exception is taken to a question asked a witness on the trial, the bill of exceptions must show that the question was objected to at the time it was asked,⁴ and not only the question,⁵ but also the answer⁶ to it must be preserved in the bill, for error cannot be predicated upon the question, while it may be upon the answer,⁷ and it must appear in the bill of exceptions that an exception was taken at the time⁸ the ruling was made. The bill of exceptions must be signed⁹ and sealed¹⁰ by the judge who tried the cause, and marked "filed" by the clerk,¹¹ or the Supreme Court will not look into it to see if there is error. An affidavit setting forth all the evidence and facts cannot be sub-

¹ *Haskins v. Haskins*, 67 Ills., 446.

² *Gardiner v. Haynie*, 42 Ills., 291; *Metcalf v. Edmiston*, 25 Ills., 392; *Nathan v. City of Bloomington*, 46 Ills., 347; *Toledo, P. & W. R. R. Co. v. Miller*, 55 Ills., 448; *Snyder v. Laframboise*, Breese, 269, 2d Ed., 343; *Mathews v. Hamilton*, 23 Ills., 470; *Winslow v. Newlan*, 45 Ills., 147.

³ *Deen v. Cunne*, 46 Ills., 69; *Smith v. Frazer*, 61 Ills., 164; *Petty v. Scott*, 5 Gilm., 209; *Moss v. Flint*, 13 Ills., 571; *McLaughlin v. Walsh*, 3 Scam., 185; *Lyon v. Boilvin*, 2 Gilm., 628; *Hatch v. Potter*, 2 Gilm., 725; *McBain v. Enloe*, 13 Ills., 76; *Ballance v. Leonard*, 37 Ills., 43; *Winslow v. Newlan*, 45 Ills., 150; *Rust v. Frothingham*, Breese, 258, 2d Ed., 331.

⁴ *Gardiner v. Haynie*, 42 Ills., 293.

⁵ *Warner v. Manski*, 17 Ills., 235.

⁶ *Russel v. Martin*, 2 Scam., 492; *Hays v. Smith*, 3 Scam., 427; *Parsons v. Dunaway*, 4 Scam., 194.

⁷ *State v. Keeler*, 28 Iowa, 557; *Miller v. Houcke*, 1 Scam., 501.

⁸ *Miner v. Phillips*, 42 Ills., 131; *Gardiner v. Haynie*, 42 Ills., 293.

⁹ *Reeves v. Reeves*, 54 Ills., 332.

¹⁰ *Miller v. Jenkins*, 44 Ills., 443; *Jones v. Sprague*, 2 Scam., 55; *P. M. L. & Co. v. City of Chicago*, 56 Ills., 304.

¹¹ *Holmes v. Parker*, 1 Scam., 567.

stituted for a bill of exceptions, and will not be considered by the Supreme Court.¹

§ 1035. *Preparing, Settling and Filing the Bill of Exceptions.*—A bill of exceptions should be made up and signed during the term at which the cause is tried, except in cases where counsel consent, or the judge by an entry on the record directs that it may be prepared in vacation and signed by the judge, but in all cases it should appear on its face to have been taken and signed at the trial.² Where a party presents his bill of exceptions to the judge within the time prescribed for its being filed, he has complied with the rule so far as it is in his power to do so, and he is not to be prejudiced because the judge may not actually sign the bill until after the time so fixed has expired.³ Where the judge has signed the bill of exceptions, nothing appearing to the contrary, it will be presumed he would not have done so unless it had been presented to him in proper time.⁴ The mere fact that the bill of exceptions was not filed within the time prescribed does not rebut this presumption, though it may be rebutted by proof.⁵ If the bill of exceptions is presented to the judge at the proper time, except in those cases where a writ of error or of appeal is not allowed,⁶ he may be compelled by a mandamus issued from the Supreme Court to settle, sign and seal the same,⁷ and if the judge refuses to obey the mandamus and resigns, the Supreme Court may consider the bill of exceptions as a part of the record without being signed.⁸ The court may in its discretion permit a bill of exceptions to be filed at a term

¹ *McLaughlin v. Walsh*, 3 Scam., 185; *Swain v. Oawood*, 2 Scam., 505.

² *Evans v. Fisher*, 5 Gilm., 453; *Burst v. Wayne*, 13 Ills., 666; *Salonstall v. Canal Commissioners*, 13 Ills., 705; *I. C. R. R. Co.*, 24 Ills., 45; *Johnson v. Ackless*, Breese, 59, 2d Ed., 92.

³ *Underwood v. Hossack*, 40 Ills., 98.

⁴ *Id.*

⁵ *Id.*; *Dent v. Davison*, 52 Ills., 110.

⁶ *Dent v. Davison*, 52 Ills., 109.

⁷ *Weatherford v. Wilson*, 2 Scam., 255; *People v. Pearson*, 2 Scam., 189; 3 Scam., 271.

⁸ *Bristol v. Phillipps*, 3 Scam., 287.

next subsequent to that of the trial.¹ Where the counsel agreed that a bill of exceptions might be settled out of term, the court refused to exclude the bill of exceptions from the record.² But where two years,³ two terms,⁴ of the court have intervened since the trial before the bill of exceptions was signed and no reason for the delay appears upon the face of the record, the bill of exceptions should not be signed, and if signed should be stricken from the record, except under very extraordinary circumstances. While it is for the judge trying a cause to determine in the first instance whether the requirements of the law have been so far complied with as to make it his duty to sign a bill of exceptions, yet where that has not been done the bill should not be signed.⁵ A bill of exceptions filed two months and a half after the trial of a cause, without any order or leave of the court, does not make it a part of the record.⁶

FORM OF A BILL OF EXCEPTIONS.

State of Illinois, }
 ——— County. } ss.

IN CIRCUIT COURT.

To — Term, A. D. 18—.

The People of the }
 State of Illinois, }
vs.

Bill of Exceptions.

C. D. }

Be it remembered, that upon the arraignment of the prisoner at the — term of the circuit court of said county of —, in said state of Illinois, and before pleading or taking any other steps in this cause, the defendant by his counsel moved to quash the indictment in this cause upon the following grounds:

1. That (*state one of the grounds*).

2. That (*state another ground, and so on until all the grounds are stated*), which motion was overruled by the court. To which ruling of the court, the defendant by his counsel then and there excepted.

Be it further remembered that on the — day of — A. D. 18—, at the

¹ Buckmaster v. Beams, 4 Gilm., 443; Brownfield v. Brownfield, 58 Ills. 152.

² Evans v. Fisher, 5 Gilm., 453.

³ Dent v. Davison, 52 Ills., 110.

⁴ Burst v. Wayne, 13 Ills., 664.

⁵ Dent v. Davison, 52 Ills., 110.

⁶ Hance v. Miller, 21 Ills., 636.

— term of the circuit court of said county of —, in said state of Illinois, being the term at which the indictment in this cause was found and the first term of said court at which an application for a change of venue in this cause might have been heard, the defendant applied to the court for a change of venue because the judge of the court then was (or "*the inhabitants of the said county in which this cause was then pending, then were*") prejudiced against him, and then and there filed in the said court, and read on the hearing of the said application, a notice (*stipulation*), petition and affidavits which are in the words and figures following, *to wit.* (*here insert exact copies of these papers*). Whereupon the people by the state's attorney filed in said court and read on the hearing of the said application, an affidavit which is in the words and figures following, *to wit.* (*here insert copy of the affidavit*), which said papers are all the papers and evidence offered, used or read on the hearing of the said application for a change of venue in this cause. But the court, after then and there hearing the said application for a change of venue, refused to grant the same, to which ruling and decision of the court the defendant by his counsel then and there excepted.

Be it further remembered, that on the trial of this cause on the — day of —, A. D. 18—, at the — term, A. D. 18—, of the said circuit court, the people, to maintain the issue on their part, called as a witness E. F., who, being duly sworn, testified as follows: (*here insert the evidence of the witness and all the other evidence given by the people*).

And the said defendant, to maintain the issue on his part, called as a witness G. H., who being duly sworn, testified as follows: (*here insert the testimony of the witness and such other evidence as is given by the defendant*), which was all the evidence offered by either of the said parties.

The court then at the instance and request of the people by the state's attorney, instructed the jury as follows: (*here insert the instructions given for the people*). To the giving of all and each of the said instructions for the people, the counsel for the defendant then and there excepted. The court then gave the following instructions for the defendant (*here insert the instructions given for the defendant*).

And the counsel for the defendant then and there asked the court to give to the jury the following written instructions for the defendant (*here insert the instructions which the defendant asked the court to give that the court refused to give*). But the court refused to give these instructions to the jury. To the refusing to give the same and each of them to the jury, the defendant by his counsel then and there excepted.

And the counsel for the defendant then and there also requested the court to give to the jury the following additional written instructions for the defendant (*here insert the additional instructions as asked to be given*) which the court refused to give as requested, but modified the same so as to read as follows: (*here insert the instructions as modified*) and then gave the same as modified to the jury. To the modification of which, and to each and every modification of the said instructions, the defendant then and there excepted.

And thereupon the jury rendered a verdict against the defendant of guilty.

And whereupon, on a subsequent day of the term, before any judgment was entered on the said verdict, the said defendant by his counsel moved the court to set aside the verdict of the jury and for a new trial in said 'cause upon the grounds and for the reasons following, viz.:

1. (*Here insert the grounds of the motion.*)

And the said defendant then and there filed in said court the respective affidavits of the said defendant, and of E. F. and G. H., which were read on the hearing of the said motion and are all the papers and evidence offered, used or read on the hearing thereof. But the court, after hearing of the said motion of the defendant to set aside the verdict of the jury and for a new trial, overruled the same, and rendered judgment upon the said verdict. To which ruling and decision of the court the defendant by his counsel then and there excepted.¹

And for as much as the matters set forth do not fully appear of record the defendant by his counsel tenders this bill of exceptions, and prays that the same may be signed and sealed by the judge of this court, pursuant to the statute in such case made and provided, which is done accordingly this — day of —, A. D. 18—.

———, Judge. [SEAL].

§ 1036. **Amendment of a Bill of Exceptions.** — A party taking a bill of exceptions, on discovering that it is imperfect, should on proper notice apply to the circuit court in open court to have it amended, and have the amendment appear from an order entered in term time, and then the amended record can be filed in the Supreme Court and error be assigned upon it.² But an amended bill of exceptions filed in the Supreme Court subsequent to the filing of the record itself, without suggesting of a diminution of the record, and obtaining leave of the Supreme Court to file the same, will not become a part of the record nor be considered by the court.³ A bill of exceptions was on motion allowed to be amended by the judge who tried the cause by affixing his seal thereto, although the judge was not in office at the time of such amendment.⁴

¹ A motion in arrest of judgment need not be inserted in the bill of exceptions, for it saves itself upon the record. *Nichols v. People*, 40 Ills., 396; *Mix v. Nettleton*, 29 Ills., 245.

² *Wallahan v. People*, 40 Ills., 102; *Goodrich v. City of Minock*, 62 Ills., 122; *Elliott v. Levings*, 54 Ills., 213; *Newman v. Ravenscroft*, 67 Ills., 496

³ *Elliott v. Levings*, 54 Ills., 213.

⁴ *Frazier v. Laughlin*, 1 Gilm., 185.

2. MISCELLANEOUS MATTERS RELATING TO WRITS OF ERROR.

§ 1037. **Writs of Error in Capital Cases.** — The statute provides that “in any prosecution by indictment for a capital offense, when the sentence is death, the party aggrieved by manifest and material error, appearing of record, may be relieved by a writ of error, in the following manner, *to wit*.:

“1. He shall obtain a certified copy of the record from the clerk, and a certificate from the judge who tries the cause, or from the prosecuting officer on the trial, that he is of the opinion that such record contains a full and true history of the proceedings on the trial.

“2. He shall present such transcript and certificate, with an assignment of the errors relied upon, to the Supreme Court, if in session, or to one of the judges thereof in vacation.

“3. If after inspecting such transcript, the court or judge is of opinion that there is reasonable cause for allowing a writ of error, and shall also be of the opinion that there is reasonable doubt as to the guilt of the defendant, it shall be granted by indorsement on the back of such transcript, with a direction that the same shall be a *supersedeas*.

“4. Upon the filing of such transcript and order, the clerk of the Supreme Court shall issue a *supersedeas* to stay the execution of the sentence of death until the further order of the court, but the prisoner shall not be discharged from jail.”¹

§ 1038.—**When Affirmed — Sentence.**—“If the judgment is affirmed, the Supreme Court shall, by order, fix the time when the original sentence of death shall be executed, a copy of which order shall be sufficient authority to the sheriff for the execution of the prisoner at the time therein specified.”²

§ 1039. **Writs of Error in Other Cases.** — “Writs of error in all criminal cases, where the sentence is not death, shall be considered as writs of right, and issued of course.”³

§ 1040. **Supersedeas in Other Cases.** — “When a *supersedeas* is

¹ R. S., 414, § 458

² Id., 415, § 459.

³ Id., § 460.

desired, a transcript of the record, with a certificate and assignment of errors, must be presented to the Supreme Court, if in session, or to one of the judges thereof in vacation, in like manner as in cases where the sentence is death."¹

§ 1041. **Issued, How.** — "If, after inspecting the transcript, the court or judge is of the opinion that there is reasonable cause for allowing a writ of error, and shall also be of the opinion that there is a reasonable doubt as to the guilt of the defendant, it shall be granted, by indorsement on the back of the transcript, with a direction that the same be made a *supersedeas*, and a *supersedeas* shall issue in like manner and with like effect as in cases where the sentence is death."²

§ 1042. **What cannot be Assigned for Error.** — It cannot be assigned for error that the court refused to give instructions asked for by the adverse party.³ Where the court in modifying an instruction asked by the defendant, merely employed the language of the defendant used in another of his instructions, it was held that although the instruction as thus given was erroneous the defendant could not be allowed to complain.⁴

§ 1043. **Letting to Bail.** — "When the court or judge is of opinion that the party obtaining such writ of error ought to be bailed until the determination of the writ, and he is at the time in custody, the said court or judge may make an order to admit such prisoner to bail, upon his entering into a recognizance to the people of the state of Illinois, in such sum and with such security as the said court or judge shall prescribe, conditioned that the prisoner will appear at the next term of the court in which his trial took place, and at each subsequent term of said court on the first days thereof, until the determination of such writ of error, and will not at any of the terms of said court depart the court without leave, and

¹ R. S., 416, § 461.

² Id., § 462.

³ Bailey v. Campbell, 1 Scam., 147.

⁴ Pierce v. Millay, 62 Ills., 133.

that in case the judgment is affirmed he will surrender himself to the sheriff or warden, or other officer from whose custody he is bailed."¹

FORM OF A RECOGNIZANCE ON OBTAINING A WRIT OF ERROR.

State of Illinois, }
 _____ County. } ss

Be it remembered that on the _____ day of _____, A. D. 18—, C. D. of the town of _____, in the county aforesaid, and E. F. and G. H. of the town of _____, in said county, personally came before I. J., sheriff of the said county, and severally and respectively acknowledged themselves to owe and be indebted to the People of the State of Illinois, in the sum of _____ dollars, to be made and levied of their respective goods and chattels, lands and tenements to the use of the said people, if default shall be made in the following condition :

Whereas, the said C. D., at the _____ term of the circuit court of said county of _____, in the said state of Illinois, was duly convicted of (*here insert a statement of the offense*), on which conviction judgment has since been rendered against him; and whereas the said C. D., in pursuance of the statute in such case made and provided, has obtained a writ of error and supercedeas upon the said judgment from the Supreme Court of this state (*or "from —, a judge of the Supreme Court of this state"*) and the said Supreme Court (*or "said judge"*) is of the opinion that the said C. D. ought to be bailed until the determination of the said writ, the said C. D. now being in the custody of the said sheriff by virtue of the said conviction and judgment; and whereas the said Supreme Court (*or "judge"*) has made an order to admit the prisoner to bail, upon his entering into a recognizance to the People of the State of Illinois in the sum of _____ dollars, with two sufficient sureties conditioned as herein,

Now, therefore, the condition of this recognizance is such that if the above-bounden C. D., shall personally be and appear at the next term of the said circuit court, and at each subsequent term of said circuit court on the first days thereof, until the determination of such writ of error, and shall not at any of the terms of the said circuit court depart the court without leave, and that in case the judgment is affirmed he will surrender himself to the said sheriff, then this recognizance to be void, otherwise to remain in full force and virtue.

Taken, subscribed and acknowledged }	C. D. [SEAL.]
before, and approved by me on the day }	E. F. [SEAL.]
and year first above written. }	G. H. [SEAL.]
I. J., Sheriff of _____ County.	

¹ R. S., 415, § 463.

§ 1044. **Recognizance Taken by Sheriff or Warden, how Returnable.**—"If the prisoner is in custody of the sheriff, he shall take the recognizance; if in the custody of the warden of the penitentiary, he shall take the recognizance. In either case the recognizance shall be returned to the next term of the court in which the prisoner was sentenced, and there entered of record, and such proceedings may be had thereon in case of breach of the conditions thereof as in other cases of recognizance."¹

§ 1045. **Judgment Affirmed — Proceedings Thereon.**—"If the judgment is affirmed, the Supreme Court shall direct the court in which the original sentence was rendered to carry the same into effect, and shall give judgment against the plaintiff in error for costs, and execution may issue therefor from the Supreme Court."²

§ 1046. **Surrender of the Prisoner by Sureties on Judgment Affirmed.**—"When judgment is affirmed, if the prisoner was bailed from the custody of the sheriff, he shall be surrendered to the sheriff, who shall proceed to execute the judgment of the court; or if bailed from the custody of the warden, he shall be surrendered to such warden, to be dealt with according to the judgment of the court, and the warden receiving him shall immediately certify to the clerk of the court to which the recognizance is returned the fact of such surrender, which certificate shall be sufficient evidence of the compliance of the condition of the bond."³

§ 1047. **Time of Service.** — "When a prisoner has been committed to the penitentiary in pursuance of a sentence of imprisonment therein, or has been committed to the county jail pursuant to a sentence of confinement therein, and the judgment is affirmed, the time of service under the sentence of such prisoner shall commence to run from the time of such commitment, notwithstanding a *supersedeas* may have been granted: *Provided*, if any such prisoner is admitted to bail

¹ R. S., 415, § 464.

² Id., § 465.

³ Id., § 466.

after such commitment, the time during which he is out upon bail shall be excluded from the computation of his time of service.”¹

1048. **Returning Prisoner for Trial.** — “In case of the reversal of any judgment upon which any person has been committed to the penitentiary, and the granting of a new trial by the Supreme Court, it shall be the duty of the warden of the penitentiary, upon receiving a certified copy of such judgment of the Supreme Court, to deliver the person so committed to the custody of the sheriff of the county where such new trial is to be had, and of such sheriff to take and reconvey such person to the jail of his county, and for such services the sheriff shall be allowed and paid like fees as in case of commitments to the penitentiary.”²

¹ R. S., 416, § 467.

² Id., § 468.

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